COPY

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1960

No. 373

ROY R. TORCASO, APPELLANT,

vs.

CLAYTON K. WATKINS, CLERK OF THE CIRCUIT COURT FOR MONTGOMERY COUNTY, MARYLAND.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF MARYLAND

FILED AUGUST 31, 1960
JURISDICTION NOTED NOVEMBER 7, 1960

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[fol. 1]

IN THE COURT OF APPEALS OF MARYLAND

SEPTEMBER TERM, 1959

No. 199

ROY R. TORCASO, Appellant,

vs.

CLAYTON K. WATKINS, as Clerk of the Circuit Court for Montgomery County, Appellee.

Appeal from the Circuit Court for Montgomery County (Ralph G. Shure, Judge)

Appendix for Appellant

[fol. 2]

Law No. 9155

IN THE CIRCUIT COURT

FOR MONTGOMERY COUNTY, MARYLAND

ROY R. TORCASO, 3708 Brightview Street, Wheaton, Maryland,

vs.

CLAYTON K. WATKINS, as Clerk of the Circuit Court for Montgomery County, Maryland.

PETITION FOR WRIT OF MANDAMUS

To the Honorable, the Judges of said Court:

The petition of Roy R. Torcaso respectfully represents as follows:

1. That your petitioner is and was at all times material herein a citizen of the United States of America and is

and was at all times material herein a resident of Montgomery County, State of Maryland for more than two (2) years.

2. On or about June 11, 1959, your petitioner forwarded an application for a Commission as a Notary Public in and for Montgomery County, State of Maryland, to The Honorable Edward S. Northrop, State Senator for Montgomery [fol. 3] County, State of Maryland, requesting Senator Northrop's endorsement thereon.

3. The said application, dated June 3, 1959, was completely and properly filled out and contained all necessary signatures thereon.

4. On or about June 19, 1959, The Honorable Edward S. Northrop endorsed said application and forwarded it to the Office of The Governor of the State of Maryland.

5. On or about June 22, 1959, the Governor of the State of Maryland appointed your petitioner a Notary Public in and for Montgomery County, State of Maryland.

6. On or about June 22, 1959, the Office of the Secretary of State of Maryland notified your petitioner of his appointment and that his Commission had been mailed to the Clerk of the Court at the Courthouse of his County, and further directed him to appear at the Office of the said Clerk within thirty (30) days to obtain his Commission and qualify for office.

7. On or about June 25, 1959, your petitioner appeared in the Office of the Clerk of the Circuit Court for Montgomery County, State of Maryland, and stated that his purpose was to qualify for the Office of Notary Public in and for Montgomery County, State of Maryland, and to receive his Commission.

8. On or about June 25, 1959, in furtherance of the allegations contained in paragraph 7, above, Eleanor Campbell, Deputy Clerk of the Circuit Court of Montgomery County, State of Maryland, requested your petitioner to take and subscribe to the following oath and declaration:

[fol. 4]

STATE OF MARYLAND, MONTGOMERY COUNTY SS:

In the presence of Almighty God, I, Roy R. Torcaso, do solemnly promise and declare that I will support the Constitution of the United States; and that I will be faithful and bear true allegiance to the State of Maryland, and support the Constitution and Laws thereof; and that I will, to the best of my skill and judgment, diligently and faithfully without partiality or prejudice execute the office of

NOTARY PUBLIC OF
THE STATE OF MARYLAND
IN AND FOR
MONTGOMERY COUNTY

according to the Constitution and Laws of this State.

I, Roy R. Torcaso, do declare that I believe in the existence of God.

.....

Sworn to and subscribed before me, Clerk of the Circuit Court for Montgomery County, at Rockville, Maryland, this ..... day of ..... AD, 19.... .

TEST:

..... Clerk

9. On or about June 25, 1959, in reply to the said request of Eleanor Campbell, as contained in paragraph 8, above, your petitioner stated that he would not declare that he believed in the existence of God, whereupon the Clerk of the Court refused to issue to your petitioner his Commission as Notary Public in and for Montgomery County, State of Maryland.

[fol. 5] 10. Your petitioner is and was at all times material willing to take and subscribe the affirmation for the Office of Notary Public as contained in Article I, Section 6 of the Constitution of the State of Maryland, which section reads as follows:

"Every person elected or appointed to any office of profit or trust, under this Constitution, or under the laws, made pursuant thereto, shall, before he enters upon the duties of such office, take and subscribe the following oath or affirmation: I, ..., do swear (or affirm, as the case may be), that I will support the Constitution of the United States; and that I will be faithful and bear true allegiance to the State of Maryland, and support the Constitution and Laws thereof; and that I will, to the best of my skill and judgment, diligently and faithfully, without partiality or prejudice, execute the office of ....., according to the Constitution and Laws of this State • • • "

11. The duties of the Clerk of the Circuit Court for Montgomery County, State of Maryland, in this capacity is a matter in which there is no discretion whatsoever, his function therein being ministerial in nature.

12. The refusal of the said Clerk to issue unto your petitioner his Commission was in violation of the Laws and Constitution of the State of Maryland as well as the Laws, and Constitution, and its Amendments, of the United States of America (specifically, Article VI and the First and Fourteenth Amendments to the Constitution of the United States of America).

13. Your petitioner has no other adequate legal remedy to obtain the relief prayed for hereinafter.

14. And for other valid reasons to be advanced at the time of hearing on the petition.

[fol. 6] WHEREFOR, your petitioner prays as follows:

1. That a Writ of Mandamus be issued, directed to Clayton K. Watkins, as Clerk of the Circuit Court for Montgomery County, State of Maryland, commanding him to perform his duties as Clerk of said Court and render to your petitioner the Oath or affirmation as set forth in Article I Section 6 of the Constitution of the State of Maryland and upon your petitioner's swearing or affirming thereof, the said Clerk be further commanded to issue to

your petitioner his Commission as Notary Public in and for Montgomery County, State of Maryland.

2. That the Defendant be required to bear the costs of these proceedings.

s/

Roy R. Torcaso, Petitioner

Sickles and Sickles

By,

s/

Joseph A. Sickles
Attorneys for Petitioner
3400 Farthing Drive
Silver Spring, Maryland
WH 2-5763

s/

Bruce N. Goldberg
Attorney for Petitioner
4709 Montgomery Lane
Bethesda, Maryland
OL 6-4343

[fol. 7]
State of Maryland
County of Montgomery ss:

Before me, a Notary Public in and for the State and County aforesaid, personally appeared Roy R. Torcaso and did affirm that he has read the foregoing Petition, by him subscribed and that he has personal knowledge of the matters set forth therein and that they are true to the best of his knowledge and belief.

August 12 1959

s/ Richard A. Dompka
Notary Public
My Commission Expires 5/1/61

[fol. 8]

IN THE CIRCUIT COURT

FOR MONTGOMERY COUNTY, MARYLAND

[Title omitted]

DEMURRER

The Defendant, Clayton K. Watkins, Clerk of the Circuit Court for Montgomery County, Maryland, by his attorneys, C. Ferdinand Sybert, Attorney General and Stedman Prescott, Jr., Deputy Attorney General, demurs to the Petition filed by the Plaintiff herein, and to each and every paragraph thereof, and to each and every prayer for relief therein, for the reasons that the said Petition, and each and every paragraph thereof, and each and every prayer for relief therein, are insufficient in substance and in law, and for grounds therefor say:

[fol. 9] 1. That said Petition and each and every paragraph thereof fails to state a cause of action which would entitle the Plaintiff to the relief prayed.

2. That said Petition and each and every paragraph thereof fails to state the facts which would entitle the Plaintiff to relief in this Court.

3. That the action of the Clerk of Court was in accordance with the provisions of Article 37, Declaration of Rights, Maryland Constitution and, therefore, valid.

4. That the action of the Clerk of Court did not violate Article VI, and the First and Fourteenth Amendments to the Constitution of the United States.

5. And for other reasons to be assigned at the hearing upon this Demurrer.

.....

C. Ferdinand Sybert
Attorney General

.....

Stedman Prescott, Jr.
Deputy Attorney General
Attorneys for Clayton K. Watkins,
Clerk of the Circuit Court
for Montgomery County, Md.

We Hereby certify that we have mailed a copy of the within Demurrer to Bruce N. Goldberg, Esq., Attorney for the Plaintiff, at 4709 Montgomery Lane, Bethesda, Maryland, this 18th day of September, 1959.

.....

[fol. 10]

IN THE CIRCUIT COURT

FOR MONTGOMERY COUNTY, MARYLAND

ROY R. TORCASO,

Plaintiff,

vs.

CLAYTON K. WATKINS, Clerk of the Circuit Court for Montgomery County, Maryland,

Defendant.

MEMORANDUM OPINION AND ORDER

This is a Petition for a Writ of Mandamus filed by Roy T. Torcaso praying that Clayton K. Watkins, as Clerk of the Circuit Court for Montgomery County, Maryland, be commanded to issue to said petitioner his commission as a Notary Public in this State and County.

The defendant Clerk has filed a Demurrer through the Attorney General of Maryland and argument was had on this Demurrer on November 3rd, 1959, and Counsel for the petitioner and the Clerk have both filed briefs. Also the American Civil Liberties Union, as amicus curiae, has filed a memorandum in support of the petitioner's position, by permission of the Court. All briefs have been read, as have the cases cited, and the matter has been carefully considered.

[fol. 11] The petitioner alleges that he was refused his commission by the Clerk by reason of the fact that he would not take and subscribe the oath administered as follows: "In the presence of Almighty God, I, Roy R. Torcaso, do

solemnly promise and declare that I will support the Constitution of the United States; and that I will be faithful and bear true allegiance to the State of Maryland, and support the Constitution and Laws thereof; and that I will, to the best of my skill and judgment, diligently and faithfully without partiality or prejudice execute the office of Notary Public of the State of Maryland in and for Montgomery County according to the Constitution and Laws of this State. I, Roy R. Torcaso, do declare that I believe in the existence of God." He claims that the oath required is in violation of the Constitution of Maryland and of the United States of America. The office involved is one created by Statute and the petitioner concedes that such an office is one of profit and trust; the oath is one always administered for like positions, and there is no dispute as to the facts involved.

In Maryland, Article 37 of the Declaration of Rights is a restriction applicable to those who wish to hold a position of profit or trust in this State. This restriction is a qualifying condition and seems most assuredly to be one which may be rightly imposed by a sovereign state in dealing with its own officials. This is a test for qualification, as are tests for qualification in other states, and also in dealing with such matters as defense when accused of crime, marriage and divorce laws, qualification to practice a profession; likewise in enjoyment of such privileges as attendance at State Universities and the use of public school buses, matters within the police powers of the state, and those of internal administration. In dealing with subversive activities, our own case of Shub vs. Simpson at 196 Md. 177 clearly points out that Article 37 did not violate the oath [fol. 12] of office prescribed by the Constitution since it was simply a declaration showing qualification for office and not an additional oath.

Maryland is a State steeped in religious freedom, founded and guided by those who believe in the existence of God. The members of the Legislature from the date of our founding have imposed some religious restriction on the right to hold an office of profit or trust. First, in 1776 the Declaration of Rights, at Article 35 stated that "no other test of qualification ought to be required on admission to any office

of profit or trust than that of support and fidelity to this State and such oath of office as shall be directed by this Convention or the Legislature of this State and the declaration of belief in the Christian Religion". In 1851, at Article 34 of the Declaration of Rights, the restrictions were broadened to read, "and the declaration of belief in the Christian Religion; and if the party shall profess to be a Jew, his declaration shall be of his belief in a future state of reward and punishment", so that all faiths in addition to the Christian were then qualified. Now, any who believe in a supreme being may qualify. In the Convention of 1876, after much debate, all old provisions giving to the Legislature the right to exact oaths were deleted but the declaration of belief in the existence of God was retained so that Article 37 reads today as follows: "That no religious test ought ever to be required as a qualification for any office of profit or trust in this State, other than a declaration of belief in the existence of God; nor shall the Legislature prescribe any other oath of office than the oath prescribed by this Constitution." This matter is fully discussed in Davidson vs. Brice, 91 Md. 681, which is a case involving the office of County Treasurer of Anne Arundel County.

The office of Notary Public is an important one of profit and trust, and an entire Article of the Annotated Code of Maryland—Article 68—is devoted to this office and duties [fol. 13] included therein. A Notary issues oaths in accordance with the law, gives certificates, receives proof of acknowledgments of all instruments of commerce, navigation, deeds and other paper writings: he can issue protests and must keep official records of his accounts. His is a privilege, and it being solely an internal office, the people of Maryland have imposed a qualification of belief in the existence of God as a condition precedent to the taking of his oath. The foundation of such a requirement was made clear when the Constitution of Maryland was adopted by Convention in Annapolis. The Preamble to the Constitution reads as follows: "We, the People of the State of Maryland, grateful to Almighty God for our civil and religious liberty, and taking into our serious consideration the best means of establishing a good Constitution in this State for the sure

foundation and more permanent security thereof, declare:" (then follows Art. 1, etc.)

The Petitioner also argues that Article 37 violates the provision of the 1st and 14th Amendments to the Constitution of the United States. Suffice it to say, for reasons hereinbefore stated, the statutes which forbid acts detrimental to the community and place requirements for public office do not forbid religious beliefs, or even disbeliefs. The Complainant, Torcaso can continue his religious position without any interference from Maryland, either as to his present private employment or his citizenship, as neither is being interfered with.

The Court finds no conflict with the United States Constitution or the Constitution of Maryland and no authority having been cited to the contrary, the Court feels that Art. 37 of the Declaration of Rights of Maryland imposes a qualification that the petitioner has not met and his petition for Writ of Mandamus will be, and the same is hereby, denied and the Petition is hereby dismissed.

.....

Ralph G. Shure
JUDGE of the Circuit Court
for Montgomery County, Maryland

[fol. 14]

COURT OF APPEALS OF MARYLAND

[Title omitted]

STIPULATION AS TO RECORD

Pursuant to Rule 828 c, Maryland Rules of Procedure, Appellant and Appellee hereby stipulate and agree that the following extracts from the record will be included in Appellant's printed extract.

1. Petition for Writ of Mandamus
2. Defendant's Demurrer

[fol. 15] 3. Memorandum, Opinion and Order of the Circuit Court for Montgomery County that Petition for Writ of Mandamus is denied and Petition dismissed.

s/

Joseph A. Sickles
Attorney for Appellant
3400 Farthing Drive
Silver Spring, Maryland

s/

Stedman Prescott, Jr.
Attorney for Appellee
Deputy Attorney General

Carlton R. Sickles

s/

Carlton R. Sickles
Attorney for Appellant
3400 Farthing Drive
Silver Spring, Maryland

C. Ferdinand Sybert
Attorney for Appellee
Attorney General

s/

Bruce N. Goldberg
Attorney for Appellant
4709 Montgomery Lane
Bethesda, Maryland

[fol. 16]

IN THE COURT OF APPEALS OF MARYLAND

No. 199

September Term, 1959

ROY R. TORCASO,

v.

CLAYTON K. WATKINS, Clerk of the Circuit Court for Montgomery County.

OPINION BY HENDERSON, J.

Brune, C. J. concurs in the result.

June 30, 1960

[fol. 17] This appeal is from an order of the Circuit Court for Montgomery County dismissing a petition for mandamus against the Clerk of that court, after a demurrer to the petition had been sustained. The petition alleged, and the demurrer admitted, that the appellant, a citizen of the United States and a resident of Montgomery County for more than two years past, had been duly appointed by the Governor a notary public in and for that County, but when he went to the Clerk's office to obtain his commission and qualify for the office, the Clerk requested him to take and subscribe to a certain oath and declaration. The appellant declined to do so. Thereupon, the appellee refused to deliver the commission to the appellant, and suit followed.

The oath and declaration tendered to him read as follows:

"State of Maryland, Montgomery County ss:

In the presence of Almighty God, I, Roy R. Torcaso, do solemnly promise and declare that I will support the Constitution of the United States; and that I will be faithful and bear true allegiance to the State of Maryland, and support the Constitution and Laws thereof;

and that I will, to the best of my skill and judgment, diligently and faithfully without partiality or prejudice execute the office of

Notary Public of
The State of Maryland
In and For
Montgomery County

[fol. 18] according to the Constitution and Laws of this State.

I, Roy R. Torcaso, do declare that I believe in the existence of God.

.....

Sworn to and subscribed before me, Clerk of the Circuit Court for Montgomery County, at Rockville, Maryland, this ..... day of ..... AD, 19.... .

TEST:

..... Clerk"

The appellant stated that he was prepared to take the oath or affirmation prescribed by the Maryland Constitution, but refused to declare his belief in the existence of God.

The oath and declaration quoted above differs from that prescribed by Art. 1, sec. 6 of the Maryland Constitution, for all persons elected or appointed to "any office of profit or trust, under this Constitution, or under the Laws, made pursuant thereto," in two particulars. The prescribed oath, or affirmation, begins with the phrase "I, ...,, do swear, (or affirm, as the case may be,)", and it omits the separate declaration as to belief in the existence of God. It is conceded that the office of notary public is an office of profit or trust, referred to in Art. IV, sec. 45 of the Constitution, and dealt with in Code (1957), Art. 68, secs. 1-10. Sec. 1 provides that applicants shall "take the oath of office before the clerk of the circuit court for each of the counties in the State * * *." The reference here, as in Code (1957), Art. 70, sec. 7, is to the oath prescribed by the Con-
[fol. 19] stitution. Art. 37 of the Declaration of Rights provides:

"That no religious test ought ever to be required as a qualification for any office of profit or trust in this State, other than a declaration of belief in the existence of God; nor shall the Legislature prescribe any other oath of office than the oath prescribed by this Constitution."

In *Davidson* v. *Brice*, 91 Md. 681 (1900), this Court held that the Legislature had no power to require a different or supplemental oath of office, in the case of a county treasurer. Chief Judge McSherry, for the Court, said (p. 691): "Art. 37 does two things. It prohibits any religious test as a qualification for any office of profit and trust, other than a declaration of belief in the existence of God; and it prohibits any oath of office other than the one set forth in sec. 6, Art. 1, except as respects the Comptroller and Treasurer." But the opinion throws no light on the questions now raised. We may note in passing that the form of oath presented to the applicant, which did not follow the language of the Constitution giving him an option to swear or affirm, was improper. But the appellant's main contentions are (1) that a declaration of belief in the existence of God, although permitted by Article 37 as an exception to the general rule against the requiring of a religious test as a qualification for office, has never been put into effect by the Legislature, and (2) that, if the exception is self-executing under Article 37 of the Declaration of Rights, it [fol. 20] is invalid as in violation of the Fourteenth Amendment to the Federal Constitution.

On the first point, we must agree that there is no present Maryland statute implementing the exception stated in Article 37. Code (1957), Art. 70, sec. 9, provides: "It shall only be necessary for an officer who is required to take and subscribe the oath prescribed by the sixth section of the first article of the Constitution to declare orally at the time his belief in the Christian religion, or, if he profess to be a Jew, of his belief in a future state of rewards and punishments; and it shall be presumed that an officer who has taken and subscribed the oath made at the same time such declaration of belief." This section was enacted by Chapter 18, sec. 1, Acts of 1854, and has been included without change

in succeeding codifications, including those of 1860 and 1888, which, unlike other codifications, were not merely evidence of existing laws but legislative enactments of the matter therein contained. However, the section in question obviously referred to the religious tests set forth in the Constitution of 1851, which were deleted in the Constitution of 1867. The section makes no reference to belief in the existence of God, which is the only religious test now permitted. To the extent that sec. 9 refers to tests now forbidden, it can have no application in the instant case.

We think, however, that sec. 9 is significant for another reason. Its obvious purpose was to permit an oral declara-
[fol. 21] tion, and to raise a presumption of compliance with the constitutional requirements of belief in effect at the time of its enactment. In short, it assumed those requirements to be mandatory and self-executing, and merely undertook to prescribe the mode of compliance or the quantum of proof. Moreover, the language of all the constitutional provisions in effect prior to 1867 seemed to differentiate between the oath and the declaration. In the Declaration of Rights adopted in 1776, Art. 35 read: "That no other test or qualification ought to be required, on admission to any office of trust or profit, than such oath of support and fidelity to this State, and such oath of office, as shall be directed by this Convention, or the Legislature of this State, and a declaration of a belief in the Christian religion." Clearly, the Legislature was empowered to prescribe additional oaths of office, but there is no suggestion that the Legislature could dispense with the oath of support and fidelity, or the declaration of belief. Art. 34 of the Declaration of Rights of 1851 added a clause after the words "Christian religion" stating: "and if the party shall profess to be a Jew, the declaration shall be of his belief in a future state of rewards and punishments." Art. 37 of the Declaration of Rights of 1864 substituted a clause after the words "Christian religion," stating: "or in the existence of God, and in a future state of rewards and punishments", omitting the specific reference to Jews.

[fol. 22] In the proceedings of the convention of 1867, Article 37 of the Declaration of Rights was reported from the committee in the exact language of Art. 37 of the Dec-

laration of Rights of 1864. Mr. Brown advocated striking out of the constitution "any religious qualification whatever." Mr. Bernard Carter then submitted a substitute that was adopted: "That no religious test ought ever to be required as a qualification for any office of profit or trust in this State; nor shall the Legislature prescribe any other oath of office than the oath prescribed by this constitution." This was amended, on motion of Mr. Mackubin by adding after the word "State": "other than a [declaration of] belief in the existence of God." See Perlman, *Debates*, pp. 81, 173. In the context, and in the light of the historical development, we think the Convention was itself declaring that belief in the existence of God should be a qualification for office, but that no other religious test should be required.

We do not agree with the appellant that the word "ought" was used in a permissive sense. The word occurs repeatedly in the Declaration of Rights, in many instances to establish fundamental rights. It is a general rule that constitutional provisions are not given a directory construction. See *Archer* v. *State*, 74 Md. 443, 448. In *State* v. *C. & P. R. R. Co.*, 40 Md. 22, 50, Judge Alvey, with reference to the language of Art. 15, that every person "ought to contribute his proportion of public taxes * * * according to his actual [fol. 23] worth * * * ", said: " * * * this declaration of the right of the citizen is not simply directory to the Legislature, * * * it is a positive limitation or restriction on the power * * * ." It could hardly be contended, in the instant case, that Article 37 would permit the Legislature to impose religious tests other than belief in God. The real question is whether the one permitted test required further legislative action. We entertain no doubt on that score. The provision is complete in itself and needs no legislative enactment to carry it into effect or provide means for its enforcement. Cf. *Leser* v. *Lowenstein*, 129 Md. 244, 252. See also 11 Am. Jur., *Constitutional Law*, § 75.

We also attach significance to the fact that there appears to be a long and unbroken administrative construction, whereby a declaration of belief in God has been required as a qualification for office in Maryland. Unfortunately, the record does not disclose the contemporaneous practice in 1867. But the practice was clearly recognized by Attorney General Armstrong in 1922, when he ruled that it was neces-

sary that every official should be "required in some definite way" to declare his belief in the existence of God. 7 Op. Atty. Gen. 486.

We come, then, to the question whether the declaration in question violates the Federal Constitution. It is well settled that the provisions of the Federal Constitution are supreme, even over a provision of the State Constitution. *Baltimore Radio Show, Inc.* v. *State*, 193 Md. 300, 323. The [fol. 24] appellant does not contend that clause three of Art. VI of the Federal Constitution is applicable to the states. That clause, providing that "no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States," is plainly inapplicable. Nor is it contended that this clause could be imported into the Fourteenth Amendment. Obviously, Congress could not prescribe qualifications for state office, at least not so long as we retain a Federal form of government. However, it is well settled that the First Amendment, providing that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, * * * ", is applicable to the states through the Fourteenth Amendment, as a deprivation of "life, liberty, or property, without due process of law", or a denial of "the equal protection of the laws." *Hopkins* v. *State*, 193 Md. 489, 496; *Hanauer* v. *Elkins, Pres., U. of Md.*, 217 Md. 213, 219. The appellant contends, in effect, that the State Constitutional qualification deprives him of his "liberty" to disbelieve in God, and discriminates against him as a non-believer.

We are referred to no case directly in point. In general, the cases distinguish between a right to believe, and a right to act on one's belief. *Cantwell* v. *Connecticut*, 310 U.S. 296, 303; *Craig* v. *State*, 220 Md. 590, 599. The first is absolute, the second is not. The petitioner is not compelled to believe or disbelieve, under threat of punishment or other compul- [fol. 25] sion. True, unless he makes the declaration of belief he cannot hold public office in Maryland, but he is not compelled to hold office. The Fourteenth Amendment does not prevent the states from establishing qualifications for office, at least where the qualifications are not based on such an unreasonable and improper classification as to be dis-

criminatory. Cf. *Snowden* v. *Hughes*, 321 U.S. 1, *Wieman* v. *Updegroff*, 344 U.S. 183, and *Slochower* v. *Board of Education*, 350 U.S. 551. In the flag salute case, *Board of Education* v. *Barnette*, 319 U.S. 624, overruling *Minersville Dist.* v. *Gobitis*, 310 U.S. 586, some stress was laid upon the fact that school attendance was compulsory, and criminal penalties were imposed for non-attendance. Stress was also laid upon the lack of any showing of substantial or apparent relation to the public welfare, in the requirement of a salute to the flag of the United States.

In the absence of any direct authority on the point, we find it difficult to believe that the Supreme Court will hold that a declaration of belief in the existence of God, required by Article 37 of our Declaration of Rights as a qualification for State office, is discriminatory and invalid. As Mr. Justice Douglas, speaking for a majority of the Court in *Zorach* v. *Clauson*, 343 U.S. 306, 313, said: "We are a religious people whose institutions presuppose a Supreme Being." The problem here is more basic than in any of the cases cited. An oath, predicated upon a belief in God, is a [fol. 26] regular incident of judicial proceedings. There can be no doubt that at common law an atheist was incompetent as a witness. See Rapalje, *Witnesses*, § 11; 3 Wharton, *Criminal Evidence* (12th ed.), § 750; 6 Wigmore, *Evidence* (3d ed.), §§ 1816-1828. See also *Atwood* v. *Welton*, 7 Conn. 66 (1828); *Thurston* v. *Whitney*, 2 Cush. (Mass.) 104 (1848); *United States* v. *Miller*, 236 Fed. 798 (D. C., Wash.). There has been no constitutional or statutory abrogation of the common law rule in this State.

Article 39 of our Declaration of Rights provides: "That the manner of administering an oath or affirmation to any person, ought to be such as those of the religious persuasion, profession, or denomination, of which he is a member, generally esteem the most effectual confirmation by the attestation of the Divine Being." Article 21 provides that in all criminal prosecutions an accused shall have a right "to examine the witnesses for and against him on oath". It might well be contended that a person convicted upon unsworn testimony, or the testimony of an atheist, would be deprived of due process, or trial according to the "law of the land." Article 36 provides that "as it is the duty of

every man to worship God in such manner as he thinks most acceptable to Him, all persons are equally entitled to protection in their religious liberty; * * * nor shall any person, otherwise competent, be deemed incompetent as a witness, or juror, on account of his religious belief; provided, he believes in the existence of God, and that under His dispensation such person will be held morally accountable for [fol. 27] his acts, and be rewarded or punished therefor either in this world or in the world to come." To the members of the Convention, as to the voters who adopted our Constitution, belief in God was equated with a belief in moral accountability and the sanctity of an oath. We may assume that there may be permissible differences in the individual's conception of God. But it seems clear that under our Constitution disbelief in a Supreme Being, and the denial of any moral accountability for conduct, not only renders a person incompetent to hold public office, but to give testimony, or serve as a juror. The historical record makes it clear that religious toleration, in which this State has taken pride, was never thought to encompass the ungodly.

The Federal Constitution itself is not lacking in references to an oath, or affirmation, as a qualification for office. See Art. I, sec. 3; Art. II, sec. 1; Art. VI, and Amendment IV. See also 5 U.S.C.A., § 16. It would appear to be somewhat paradoxical if a Notary Public, who is given the power to administer oaths and certify thereto, under Code (1957), Art. 68, sec. 3 (see also Maryland Rule 5 c, and Code (1957), Art. 1, secs. 10, 11), might qualify for the office even if he disavowed belief in God and in the sanctity of the very oaths he administers. If it be assumed, as has been suggested, that the real deterrent to false swearing, in our time, is not the belief in God but the fear of prosecution for perjury, we cannot say that the distinction between believers and non-believers is so patently inappropriate as [fol. 28] a security for good conduct, as to make it invidious under the Fourteenth Amendment.

Order affirmed, with costs.

[fol. 30] PROOF OF SERVICE OF NOTICE OF APPEAL
(omitted in printing)

[fol. 31]

IN THE COURT OF APPEALS OF MARYLAND

No. 199

September Term, 1959

ROY R. TORCASO, Appellant,

v.

CLAYTON K. WATKINS, Clerk of the Circuit Court for Montgomery County, Appellee.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

I. Notice is hereby given that Roy R. Torcaso, the appellant above named, hereby appeals to the Supreme Court of the United States from the final judgment of the Court of Appeals of Maryland affirming the judgment of the Circuit Court for Montgomery County, entered in this action on June 30, 1960.

II. The Clerk will please prepare a transcript of the record in this cause, for transmission to the Clerk of the Supreme Court of the United States, and include in said transcript the following: Petition for Writ of Mandamus, Demurrer, and Memorandum Opinion and Order in the Circuit Court for Montgomery County, all of which were stipulated to be and were printed in appellant's brief to this Court, and the decision of this Court.

[fol. 32] III. The following questions are presented by this appeal:

Is that portion of Article 37, Declaration of Rights, Maryland Constitution which requires "a declaration of belief in the existence of God" as a "religious test" for an "office of

profit or trust," in conflict with the Constitution of the United States, specifically:

"1. The ban in the First Amendment, made applicable to the states by the Fourteenth Amendment, on laws respecting an establishment of religion?

2. The provision in the First Amendment, made applicable to the states by the Fourteenth Amendment, protecting the free exercise of religion?

3. The due process and equal protection clauses of the Fourteenth Amendment?

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[fol. 33] PROOF OF SERVICE OF AMENDED NOTICE OF APPEAL (omitted in printing)

[fol. 34] [File endorsement omitted]

IN THE COURT OF APPEALS OF MARYLAND

No. 199

September Term, 1959

ROY R. TORCASO, Appellant,

v.

CLAYTON K. WATKINS, Clerk of the Circuit Court for Montgomery County, Appellee.

AMENDED NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES—Filed August 16, 1960

I. Notice is hereby given that Roy R. Torcaso, the appellant above named, hereby appeals to the Supreme Court

of the United States from the final judgment of the Court of Appeals of Maryland affirming the judgment of the Circuit Court for Montgomery County, entered in this action on June 30, 1960.

II. The Clerk will please prepare a transcript of the record in this cause, for transmission to the Clerk of the Supreme Court of the United States, and include in said transcript the following: Petition for Writ of Mandamus, Demurrer, and Memorandum Opinion and Order in the Circuit Court for Montgomery County, all of which were stipulated to be and were printed in appellant's brief to this Court, and the decision of this Court.

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Is that portion of Article 37, Declaration of Rights, Maryland Constitution which requires "a declaration of belief in the existence of God" as a "religious Test" for an "office of profit or trust," in conflict with the Constitution of the United States, specifically:

1. The ban in the First Amendment, made applicable to the states by the Fourteenth Amendment, on laws respecting an establishment of religion?

2. The provision in the First Amendment, made applicable to the states by the Fourteenth Amendment, protecting the free exercise of religion?

3. The due process and equal protection clauses of the Fourteenth Amendment?

4. The ban on religious tests in Article VI?

Leo Pfeffer, c/o American Jewish Congress, 15 East 84th Street, New York 28, New York; Joseph A. Sickles, Carlton R. Sickles, Sickles and Sickles, 3400 Farthing Drive, Silver Spring, Maryland; Bruce N. Goldberg, 4709 Montgomery Lane, Bethesda, Maryland, Attorneys for Appellant.

[fol. 36] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 37]

SUPREME COURT OF THE UNITED STATES

[Title omitted]

ORDER NOTING PROBABLE JURISDICTION—November 7, 1960

Appeal from the Court of Appeals of the State of Maryland.

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted.

November 7, 1960

IN THE

Supreme Court of the United States

October Term, 1960

No. 373

ROY R. TORCASO,

Appellant,

v.

CLAYTON K. WATKINS,
Clerk of the Circuit Court
for Montgomery County, Maryland,

Appellee.

On Appeal from the Court of Appeals of Maryland

JURISDICTIONAL STATEMENT

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IN THE

Supreme Court of the United States

October Term, 1960

No. .....

ROY R. TORCASO,

Appellant,

v.

CLAYTON K. WATKINS,
Clerk of the Circuit Court
for Montgomery County, Maryland,

Appellee.

On Appeal from the Court of Appeals of Maryland

JURISDICTIONAL STATEMENT

Appellant appeals from the judgment of the Court of Appeals of Maryland entered on June 30, 1960, in which the Court of Appeals of Maryland affirmed the judgment of the Circuit Court for Montgomery County, Maryland, entered on November 18, 1959. The Court of Appeals of Maryland is the highest state court available to appellant. Maryland Constitution, Art. IV, Sec. 1.

Opinions Below

The opinion of the Court of Appeals of Maryland, dated June 30, 1960, is not yet reported. (A copy of the opinion and judgment of the Maryland Court of Appeals is attached hereto as Appendix A.) The opinion of the Montgomery County, Maryland, Circuit Court, is not yet reported. (A copy of the Circuit Court memorandum opinion and order is attached hereto as Appendix B.).

Jurisdiction

On August 13, 1959, Appellant filed a petition for writ of mandamus in the Circuit Court for Montgomery County, Maryland, praying that a writ be issued directed to Appellee as Clerk of the Circuit Court for Montgomery County, commanding him to perform his duties as Clerk of that Court and to issue to Appellant his commission as Notary Public in and for Montgomery County, State of Maryland, upon his taking the oath of affirmation set forth in Article I, Section 6 of the Maryland Constitution. R. 2-6. Appellee demurred to the petition. R. 8-9. On November 18, 1959, after hearing on the demurrer, the Circuit Court for Montgomery County issued its memorandum opinion and order denying and dismissing the petition. R. 10-13.

On Appellant's appeal, the Maryland Court of Appeals, by opinion and judgment filed on June 30, 1960, affirmed the judgment of the Circuit Court. R. 16-19.

On August 3, 1960, Appellant filed in the Court of Appeals of Maryland its Notice of Appeal to this Court. An amended Notice of Appeal was filed on August 16, 1960.

The jurisdiction of the Supreme Court to review the judgment of the Supreme Court of Maryland is conferred by 28 U. S. C. §1257 (2). The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on appeal in this case: *Railway Express Agency* v. *Virginia*, 282 U. S. 440; *Adamson* v. *California*, 332 U. S. 46, 48.

Statute Involved

Article 37 of the Declaration of Rights of the Maryland Constitution, the validity of which is drawn in question, provides as follows:

> That no religious test ought ever be required as a qualification for any office of profit or trust in this State, other than a declaration of belief in the existence of God; nor shall the Legislature prescribe any other oath of office than the oath prescribed by this Constitution.

Questions Presented

Is that portion of Article 37, Declaration of Rights, Maryland Constitution which, as interpreted by the Maryland Court of Appeals, requires "a declaration of belief in the existence of God" as a "religious test" for an "office of profit or trust," in conflict with the Constitution of the United States, specifically:

1. The ban in the First Amendment, made applicable to the states by the Fourteenth Amendment, on laws respecting an establishment of religion?

2. The provision in the First Amendment, made applicable to the states by the Fourteenth Amendment protecting the free exercise of religion?

3. The due process and equal protection clauses of the Fourteenth Amendment?

4. The ban on religious tests in Article VI?

Statement of the Facts

The undisputed facts of this case, as set forth in the Petition, to which Appellee demurred, are as follows:

Appellant, a citizen of the United States of America and resident of Montgomery County, State of Maryland, made a proper application for a commission as a Notary Public in and for Montgomery County. His application was properly endorsed by the Honorable Edward S. Northrop, State Senator for Montgomery County, and forwarded by him to the Governor of the State. On or about the 22nd of June, 1959, the Governor appointed Appellant a Notary Public in and for Montgomery County, State of Maryland.

In accordance with instructions received from the Office of the Secretary of State, Appellant went to the office of the Clerk of the Circuit Court for Montgomery County to obtain his commission and qualify for office. At this time, Appellee requested Appellant to take and subscribe to the following oath and declaration:

State of Maryland, Montgomery County ss:

In the presence of Almighty God, I, Roy R. Torcaso, do solemnly promise and declare that I will support the Constitution of the United States; and that I will be faithful and bear true allegiance to the State of Maryland, and support the Constitution and Laws thereof; and that I will, to the best of my skill and judgment, diligently and faithfully without partiality or prejudice execute the office of

Notary Public of
The State of Maryland
in and for
Montgomery County

according to the Constitution and Laws of this State.

I, Roy R. Torcaso, do declare that I believe in the existence of God.

_____

Sworn to and subscribed before me, Clerk of the Circuit Court for Montgomery County, at Rockville, Maryland, this —— day of ———— AD, 19——.

TEST:

_____Clerk

Appellant stated that he would not declare his belief in the existence of God. Thereupon, Appellee refused to render the Commission to Appellant.

The federal questions here presented were first raised in paragraph 12 of Appellant's pleading before the Circuit Court for Montgomery County, Maryland (R. 5) and his claim was denied by the decision of that court in the penultimate paragraph of its opinion (R. 13). Appellant's claim was then presented to the Maryland Court of Appeals and denied in the decision of that court. R. 23-28.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

The Maryland Constitution, as construed by the Maryland Court of Appeals, restricts the holding of public office to those willing to declare a belief in the existence of God. Appellant, qualified in all other respects for the position of Notary Public, declines to subscribe to such a declaration for the reason that he does not believe in the existence of God.

It is Appellant's position that a state cannot constitutionally require its office-holders to profess any religious belief or disbelief.

I. Eligibility for a State office conditioned upon a belief in the existence of God constitutes a law respecting an establishment of religion in violation of the First Amendment, made applicable to the States by the Fourteenth Amendment.

In *Everson* v. *Board of Education*, 330 U. S. 1, and again in *McCollum* v. *Board of Education*, 333 U. S. 203, this Court spelled out in detail the meaning of the ban on laws respecting an establishment of religion. In both cases, the Court stated:

> The "establishment of religion" clause of the Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa. In the words of Jefferson, the clause against establishment of religion by law was intended to erect "a wall of separation between Church and State." (*Everson* case, 330 U. S. at pp. 15-16; *McCollum* case, 333 U. S. at pp. 210-211).

In these cases the Court expressly held that the Constitution imposes upon both the Federal and State governments a mandate of neutrality not merely as among competing faiths but as between belief and non-belief. In the *Everson* case, the Court stated that the First Amendment "requires the state to be a neutral in its relations with groups of religious believers and non-believers" (330 U. S. at p. 18).

We submit that the requirement of a belief in the existence of God as a condition of holding public office violates the ban on establishment of religion in the First Amendment, first, because it prefers one or some religions over others; second, because it aids religion as against non-

religion and thus transgresses the mandate of neutrality; and third, because historically, the imposition of a religious test has always been considered a major form of establishment of religion.

The requirement of a belief in the existence of God prefers some religions over others, specifically theistic religions over those which are non-theistic.

It is frequently assumed that all religions are founded upon a belief in the existence of a personal God or at least of some "God" no matter how that term is defined. This is not so. So great a religion as the Buddhist religion with over 150 million adherents throughout the world including the United States (*World Almanac*, 1959, p. 715) is not founded upon a belief in the existence of God. Rhys-Davis, "Buddhism," in *Religious Systems of the World*, p. 142; Spielberg, *Living Religions of the World*, p. 247; Alabaster, *The Wheel of the Law*, p. XXXVII.

In *Washington Ethical Culture Society* v. *District of Columbia*, 249 F. 2d 127, the United States Court of Appeals for the District of Columbia held unanimously that the Ethical Culture Society is a religious society and that Ethical Culture is a religion although it does not require "a belief in and teaching of a Supreme Being who controls the universe." The Court ruled that a statute granting tax exemption to "religious societies" must be construed to include the Ethical Culture Society. Indeed, the Court said "To construe exemptions so strictly that unorthodox or minority forms of worship would be denied the exemption benefits granted to those conforming to majority beliefs may well raise constitutional issues."

It is clear, therefore, that in fact and in law belief in the existence of God is not an indispensable element of

religion and that the validity of a religion does not in law depend upon its commitment to a Supreme Being. It follows from this that a law favoring theistic over non-theistic religions constitutes preferential treatment forbidden by the prohibition of laws respecting an establishment of religion. Such a law is no less barred by the First Amendment than one requiring a belief in Christianity, or in Trinitarian Christianity, or in Protestant Christianity. *Fowler* v. *Rhode Island*, 345 U. S. 67.

What is true of permission to use public parks for worship or meetings as in *Fowler*, is equally true of the right of non-theists to be considered along with other citizens for public office. If, as the Court has decided, preferential treatment of conventional as against unconventional and minority religions is unconstitutional in respect to the first type of preferment, we submit it is no less unconstitutional in respect to the second.

The obligations of the First Amendment are not satisfied by according governmental favors to all religions equally. The limitations of the Amendment are transgressed when the State singles out religious groups for preferential treatment over comparable non-religious groups. *Everson* case, *supra*.

It is hardly open to serious challenge that the imposition of a religious test for public office constitutes substantial and direct governmental aid to religion. Here is not involved a minimal or indirect benefit, but one which historically has been at the very root of establishment. Indeed, if there is any one test of an established church it is that the state officials or at least chief state officials are members of that church. The Anglican Chuch is established in England because the sovereign of England is and must be a member of that church. The same is true

of the Lutheran Church in the Scandinavian countries and of established churches in all countries.

This certainly has been the history of establishments in the United States. For example, it was not until 1806 that the State of New York abolished its test oath for citizenship aimed at Catholics, an oath requiring the applicant to abjure all foreign allegiances in matters "ecclesiastical as well as civil." 1 Stokes, *Church and State in the United States*, 406. This oath barred Roman Catholics from citizenship as effectively as the oath involved in the present case bars Buddhists, Ethical Culturists, and other non-theists from public office in the State of Maryland.

It was because the fathers of our Federal Constitution were determined to insure religious freedom and terminate all vestiges of an established religion that they declared that "no religious test shall ever be required as a qualification to any office or public trust under the United States." United States Constitution, Art. VI, Section 3. The debates in the Constitutional Convention and in the ratifying conventions and legislatures establish this beyond any doubt.

Since the prohibition against the establishment of religion is now applicable to the States by virtue of the Fourteenth Amendment, we submit that so too is the prohibition of religious tests for public office, which is an unseverable element in the prohibition against establishment of religion.

II. Eligibility for a State office conditioned upon a belief in the existence of God constitutes a law prohibiting the free exercise of religion in violation of the First Amendment, made applicable to the States by the Fourteenth Amendment.

The protection of the religious freedom guaranty of the First Amendment extends to minority, unpopular and unconventional beliefs. *Cantwell* v. *Connecticut*, 310 U. S. 296; *Kunz* v. *New York*, 340 U. S. 290; *West Virginia Board of Education* v. *Barnette*, 319 U. S. 624; *United States* v. *Ballard*, 322 U. S. 78, 86. It follows from this that the fact that the Appellant's views are non-theistic does not deprive him of the guarantees of the First Amendment. That Amendment protects the Buddhist, Ethical Culturist and other non-theists no less than the Protestant, Roman Catholic and Jew.

There can be no doubt that the religious freedom guaranteed by the First Amendment to the Federal Constitution does not embrace absolute "freedom to act," and all conduct "remains subject to regulation for the protection of society." *Cantwell* v. *Connecticut*, *supra*, at 303-304. But this case does not involve conduct. The oath required of Roy Torcaso is limited exclusively to belief. One thing can be said for certain: If there is any right in a democratic society that can be said to be absolute it is the right of religious belief. As the Supreme Court said in *Cantwell*, *supra*, at 303: "Thus the [First] Amendment embraces two concepts—freedom to believe and freedom to act. *The first is absolute* * * *." (Emphasis added.)

A disqualification for public office because of religious belief or non-belief constitutes an impairment of religious liberty and an interference with the free exercise of religion. Historically, along with compulsory taxation for religion, disqualification for public office was, prior to the establishment of our Constitution, the most common means of impairing religious freedom. It is no accident that

Jefferson's great Virginia Statute Establishing Religious Freedom, upon which the First Amendment is based (*Reynolds* v. *United States*, 98 U. S. 145; *Everson* case, *supra*), addressed itself to disqualification for public office. The preamble of the Statute states:

> "That our civil rights have no dependence on our religious opinions, any more than on our opinions in physics or geometry; that therefore *the proscribing of any citizen as unworthy of public confidence by laying upon him an incapacity of being called to offices of trust and emolument, unless he profess or renounce this or that religious opinion*, is depriving him injuriously of those privileges and advantages to which in common with his fellow citizens he has a natural right; that it tends only to corrupt the principle of that religion it is meant to encourage by bribing with a monopoly of worldly honors and emoluments, those who will externally profess and conform to it * * *." 12 Henig, Virginia Statutes at Large 84. (Emphasis added.)

The operative section of the Statute provided that "no man * * * shall be enforced, restrained, molested, or burthened in his body or goods, nor shall otherwise suffer on account of his religious opinions or belief; but that all men shall be free to profess, and by argument to maintain, their opinion in matters of religion, *and that the same shall in no wise diminish, enlarge or affect their civil capacities.*" (*Ibid.* Emphasis added.)

So committed to this principle was the Virginia legislature that it added a postscript to the Statute that "the rights hereby asserted are of the natural rights of man-

kind, and that if any act shall be hereafter passed to repeal the present, or to narrow its operation, such will be an infringement of natural right." (*Ibid.*)

This Court has held that if a state conditions tax exemption on a non-exercise of First Amendment liberties, it is in a constitutional sense imposing a punishment for the exercise of such liberties. If the right to public employment is conditioned on the non-exercise of Fifth Amendment liberties, then the state is punishing for the exercise of such liberties. *Speiser* v. *Randall*, 357 U. S. 513, 518; *First Unitarian Church* v. *County of Los Angeles*, 357 U. S. 545; *Konigsberg* v. *State Bar of California*, 353 U. S. 252, 273; *Slochower* v. *Board of Education*, 350 U. S. 551, 558. See Mr. Justice Frankfurter concurring in *Wieman* v. *Updegraff*, 344 U. S. 183, 195. In each of these cases the Fourteenth Amendment was held to provide the force to strike down a state activity punishing the exercise of a right guaranteed by the Bill of Rights. There is no question but that the right sought to be exercised by Appellant is transmitted undiluted from the First Amendment through the Fourteenth Amendment and restricts the states precisely as it restricts the Federal Government.

This Court has recognized that disqualification for public office on the ground of religious belief violates the Bill of Rights. No one can deny, the Court said in *United Public Workers* v. *Mitchell*, 330 U. S. 75, 100, that "Congress may not 'enact a regulation providing that no Republican, Jew or Negro shall be appointed to Federal office, or that no Federal employee shall attend Mass or tak any active part in missionary work.'"

The same principle was stated by this Court *In re Summers*, 325 U. S. 568, where the Court said (at p. 571):

> • • • It is said that the action of the Supreme Court of Illinois is contrary to the principles of that portion of the First Amendment which guarantees the free exercise of religion. Of course, under our Constitutional system, men could not be excluded from the practice of law, or indeed from following any other calling, simply because they belong to any of our religious groups, whether Protestant, Catholic, Quaker or Jewish, assuming it conceivable that any state of the Union would draw such a religious line.

III. Disqualification of an otherwise qualified applicant for State office solely for refusal to declare a belief in the existence of God deprives him of liberty without due process of law and denies him the equal protection of the laws in violation of the Fourteenth Amendment.

As its opinion indicates, the court below relied for its decision on the assertion that appointment to the office of notary public "is a privilege." But this fact does not empower the State of Maryland to act arbitrarily in the granting or withholding of the privilege. The mandate of the Fourteenth Amendment that no State shall deny to any person the equal protection of the laws bars it from granting privileges to some persons which it withholds from others unless a constitutionally reasonable distinction can be made between those favored and those not favored.

The claim that public employment or office is a privilege within the uncontrolled power of the State to grant or withhold was asserted in *Wieman* v. *Updegraff*, 344 U. S. 183, and rejected there by a unanimous Court. In its opinion the Court stated:

> • • • To draw • • • the facile generalization that there is no constitutionally protected right to public employment is to obscure the issue. For, in *United*

> *Public Workers* v. *Mitchell*, though we held that the Federal Government through the Hatch Act could properly bar its employees from certain types of political activity thought inimical to the interests of the Civil Service, we cast this holding into perspective by emphasizing that Congress could not "enact a regulation providing that no Republican, Jew or Negro shall be appointed to Federal office, or that no Federal employee shall attend Mass or take any active part in missionary work." * * * We need not pause to consider whether an abstract right to public employment exists. It is sufficient to say that constitutional protection does extend to the public servant whose exclusion pursuant to statute is patently arbitrary or discriminatory.

Admission to the bar may likewise be considered to be a privilege. An attorney is an officer of the court at least as much as a notary public is. Yet that fact does not empower a State to withhold the privilege of admission to the bar on religious grounds. (*In re Summers, supra.*) Nor may it withhold the privilege on political grounds (*Konigsberg* v. *State Bar of California*, 353 U. S. 252; *Schware* v. *Board of Bar Examiners*, 353 U. S. 232) or for other arbitrary and unjustifiable reasons.

The grant of exemption from taxation is likewise a privilege. But again a State may not act discriminatorily in granting or withholding the privilege. *Speiser* v. *Randall*, 357 U. S. 513. Attendance at a free public school can hardly be deemed a common law or constitutional right; yet it can hardly be denied that a State may not discriminate among children on the basis of religion in granting or withholding the privilege. *West Virginia Board of Education* v. *Barnette, supra; Brown* v. *Board of Education*, 347 U. S. 483.

The basic principle is that, in the granting or withholding of benefits, whether they be termed rights or privileges, the State may not discriminate among its citizens or make distinctions among them except where clearly necessary to protect an interest within the constitutional competence of the State to protect.

We submit that the furtherance of a religious purpose is not within the constitutional competence of a State in view of the restrictions of the First Amendment as made applicable to the States by the Fourteenth. As Jefferson's Virginia Statute points out, religion is corrupted not aided "by bribing with a monopoly of worldly honors and emoluments those who will externally profess and conform to it." But even if the method of withholding public office from those refusing to profess a belief in the existence of God were effective, it would still be beyond the constitutional competence of the State of Maryland to employ that method. The net result is that discrimination on the basis of religious belief or non-belief in the granting or withholding of public office is by its very nature a deprivation of liberty without due process of law and a denial of the equal protection of the law.

IV. Because of the nation-wide significance of this case and the substantiality of the constitutional questions herein involved, this Court should take jurisdiction of this case on appeal.

At this country's inception, most states imposed religious tests for public office. (Citations to early state constitutions may be found in Swancara, "The Surviving Religious Test," 18 *St. Louis L. Rev.* 105, 107 (1933).) Most states have stricken such provisions from their constitutions. However, in addition to that of Maryland, the

constitutions of Arkansas (Art. 19, §1), Pennsylvania (Art. 1, §4), and Tennessee (Article IX, §2) presently require acknowledgment of "the being of a God" in order to hold public office.

In these states, and in any other that decides to return to the restrictive days of established religion, members of various religious organizations, as well as atheists and agnostics, are disqualified from public office on account of their religious beliefs. The populace at large is deprived of the services of these people and of opportunities to choose them for elective office.

If a state can require a belief in the "existence" or "being" of God, then it is surely competent to define the God that must be believed in. E.g., it may choose between Trinitarian and Unitarian concepts.

This case comes to this Court as a case of first impression. The questions presented have not been decided by the highest court of any state except Maryland. The Maryland Court of Appeals relies for its view that this Court will uphold religious tests for public office primarily on the comment in *Zorach* v. *Clauson*, 343 U. S. 306, 313 that "We are a religious people whose institutions presuppose a Supreme Being." It is important that the states with existing religious tests for public office be advised of the extent, if any, to which such tests may be enforced consonant with the United States Constitution.

CONCLUSION

The questions presented by this appeal are substantial and of public importance. The case is one of first impression. It is respectfully submitted that probable jurisdiction should be noted.

Respectfully submitted,

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APPENDIX A

Opinion by Henderson, J.

IN THE

COURT OF APPEALS OF MARYLAND

No. 199

September Term, 1959

ROY R. TORCASO,

v.

CLAYTON K. WATKINS,
Clerk of the Circuit Court for Montgomery County

Brune, C. J.
Henderson
Hammond
Prescott
Horney, JJ.

Brune, C.J. concurs in the result

Filed: June 30, 1960

Appendix A

This appeal is from an order of the Circuit Court for Montgomery County dismissing a petition for mandamus against the Clerk of that court, after a demurrer to the petition had been sustained. The petition alleged, and the demurrer admitted, that the appellant, a citizen of the United States and a resident of Montgomery County for more than two years past, had been duly appointed by the Governor a notary public in and for that County, but when he went to the Clerk's office to obtain his commission and qualify for the office, the Clerk requested him to take and subscribe to a certain oath and declaration. The appellant declined to do so. Thereupon, the appellee refused to deliver the commission to the appellant, and suit followed.

The oath and declaration tendered to him read as follows:

"State of Maryland, Montgomery County ss:

In the presence of Almighty God, I, Roy R. Torcaso, do solemnly promise and declare that I will support the Constitution of the United States; and that I will be faithful and bear true allegiance to the State of Maryland, and support the Constitution and Laws thereof; and that I will, to the best of my skill and judgment, diligently and faithfully without partiality or prejudice execute the office of

Notary Public of
The State of Maryland
In and For
Montgomery County

and according to the Constitution and Laws of this State.

Appendix A

I, Roy R. Torcaso, do declare that I believe in the existence of God.

_____

Sworn to and subscribed before me, Clerk of the Circuit Court for Montgomery County, at Rockville, Maryland, this —— day of ———— AD, 19——.

TEST:

————————Clerk"

The appellant stated that he was prepared to take the oath of affirmation prescribed by the Maryland Constitution, but refused to declare his belief in the existence of God.

The oath and declaration quoted above differs from that prescribed by Art. 1, sec. 6 of the Maryland Constitution, for all persons elected or appointed to "any office of profit or trust, under this Constitution, or under the Laws, made pursuant thereto," in two particulars. The prescribed oath, or affirmation, begins with the phrase "I, ..., do swear, (or affirm, as the case may be,)," and it omits the separate declaration as to belief in the existence of God. It is conceded that the office of notary public is an office of profit or trust, referred to in Art. IV, sec. 45 of the Constitution, and dealt with in Code (1957), Art. 68, secs. 1-10. Sec. 1 provides that applicants shall "take the oath of office before the clerk of the circuit court for each of the counties in the State * * *." The reference here, as in Code (1957) Art. 70, sec. 7, is to the oath prescribed by the Constitution. Art. 37 of the Declaration of Rights provides:

"That no religious test ought ever to be required as a qualification for any office of profit or trust in

this State, other than a declaration of belief in the existence of God; nor shall the Legislature prescribe any other oath of office than the oath prescribed by this Constitution."

In *Davidson* v. *Brice*, 91 Md. 681 (1900), this Court held that the Legislature had no power to require a different or supplemental oath of office, in the case of a county treasurer. Chief Judge McSherry, for the Court, said (p. 691): "Art. 37 does two things. It prohibits any religious test as a qualification for any office of profit and trust, other than a declaration of belief in the existence of God; and it prohibits any oath of office other than the one set forth in sec. 6, Art. 1, except as respects the Comptroller and Treasurer." But the opinion throws no light on the questions now raised. We may note in passing that the form of oath presented to the applicant, which did not follow the language of the Constitution giving him an option to swear or affirm, was improper. But the appellant's main contentions are (1) that a declaration of belief in the existence of God, although permitted by Article 37 as an exception to the general rule against the requiring of a religious test as a qualification for office, has never been put into effect by the Legislature, and (2) that, if the exception is self-executing under Article 37 of the Declaration of Rights, it is invalid as in violation of the Fourteenth Amendment to the Federal Constitution.

On the first point, we must agree that there is no present Maryland statute implementing the exception stated in Article 37. Code (1957), Art. 70, sec. 9, provides: "It shall only be necessary for an officer who is required to take and subscribe the oath prescribed by the sixth section of the first article of the Constitution to declare orally at the time his belief in the Christian religion, or, if he profess to be a Jew, of his belief in a future state of rewards and punishments; and it shall be presumed that an officer who

has taken and subscribed the oath made at the same time such declaration of belief." This section was enacted by Chapter 18, sec. 1, Acts of 1854, and has been included without change in succeeding codifications, including those of 1860 and 1888, which, unlike other codifications, were not merely evidence of existing laws, but legislative enactments of the matter therein contained. However, the section in question obviously referred to the religious tests set forth in the Constitution of 1851; which were deleted in the Constitution of 1867. The section makes no reference to belief in the existence of God, which is the only religious test now permitted. To the extent that sec. 9 refers to tests now forbidden, it can have no application in the instant case.

We think, however, that sec. 9 is significant for another reason. Its obvious purpose was to permit an oral declaration, and to raise a presumption of compliance with the constitutional requirements of belief in effect at the time of its enactment. In short, it assumed those requirements to be mandatory and self-executing, and merely undertook to prescribe the mode of compliance or the quantum of proof. Moreover, the language of all the constitutional provisions in effect prior to 1867 seemed to differentiate between the oath and the declaration. In the Declaration of Rights adopted in 1776, Art. 35 read: "That no other test or qualification ought to be required, on admission to any office of trust or profit, than such oath of support and fidelity to this State, and such oath of office, as shall be directed by this Convention, or the Legislature of this State, and a declaration of a belief in the Christian religion." Clearly, the Legislature was empowered to prescribe additional oaths of office, but there is no suggestion that the Legislature could dispense with the oath of support and fidelity, or the declaration of belief. Art. 34 of the Declaration of Rights of 1851 added a clause after the words "Christian religion," stating: "and if the party

shall profess to be a Jew, the declaration shall be of his belief in a future state of rewards and punishments." Art. 37 of the Declaration of Rights of 1864 substituted a clause after the words "Christian religion," stating: "or in the existence of God, and in a future state of rewards and punishments," omitting the specific reference to Jews.

In the proceedings of the convention of 1867, Article 37 of the Declaration of Rights was reported from the committee in the exact language of Art. 37 of the Declaration of Rights of 1864. Mr. Brown advocated striking out of the constitution "any religious qualification whatever." Mr. Bernard Carter then submitted a substitute that was adopted: "That no religious test ought ever to be required as a qualification for any office of profit or trust in this State; nor shall the Legislature prescribe any other oath of office than the oath prescribed by this constitution." This was amended, on motion of Mr. Mackubin by adding after the word "State": "other than a [declaration of] belief in the existence of God." See Perlman, *Debates*, pp. 81, 173. In the context, and in the light of the historical development, we think the Convention was itself declaring that belief in the existence of God should be a qualification for office, but that no other religious test should be required.

We do not agree with the appellant that the word "ought" was used in a permissive sense. The word occurs repeatedly in the Declaration of Rights, in many instances to establish fundamental rights. It is a general rule that constitutional provisions are not given a directory construction. See *Archer* v. *State*, 74 Md. 443, 448. In *State* v. *C. & P. R. R. Co.*, 40 Md. 22, 50, Judge Alvey, with reference to the language of Art. 15, that every person "ought to contribute his proportion of public taxes * * * according to his actual worth * * *," said: "* * * this declaration of the right of the citizen is not simply directory to the Legis-

lature, * * * it is a positive limitation or restriction on the power * * *." It could hardly be contended, in the instant case, that Article 37 would permit the Legislature to impose religious tests other than belief in God. The real question is whether the one permitted test required further legislative action. We entertain no doubt on that score. The provision is complete in itself and needs no legislative enactment to carry it into effect or provide means for its enforcement. Cf. *Leser* v. *Lowenstein*, 129 Md. 244, 252. See also 11 Am. Jur., *Constitutional Law*, §75.

We also attach significance to the fact that there appears to be a long and unbroken administrative construction, whereby a declaration of belief in God has been required as a qualification for office in Maryland. Unfortunately, the record does not disclose the contemperaneous practice in 1867. But the practice was clearly recognized by Attorney General Armstrong in 1922, when he ruled that it was necessary that every official should be "required in some definite way" to declare his belief in the existence of God. 7 Op. Atty. Gen. 486.

We come, then, to the question whether the declaration in question violates the Federal Constitution. It is well settled that the provisions of the Federal Constitution are supreme, even over a provision of the State Constitution. *Baltimore Radio Show, Inc.* v. *State*, 193 Md. 300, 323. The appellant does not contend that clause three of Art. VI of the Federal Constitution is applicable to the states. That clause, providing that "no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States," is plainly inapplicable. Nor is it contended that this clause could be imported into the Fourteenth Amendment. Obviously, Congress could not prescribe qualifications for state office, at least not so long as we retain a Federal form of government. However, it is well settled that the First Amendment, providing that

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, * * *," is applicable to the states through the Fourteenth Amendment, as a deprivation of "life, liberty, or property, without due process of law," or a denial of "the equal protection of the laws." *Hopkins* v. *State*, 193 Md. 489, 496; *Hanauer* v. *Elkins, Pres., U. of Md.*, 217 Md. 213, 219. The appellant contends, in effect, that the State Constitutional qualification deprives him of his "liberty" to disbelieve in God, and discriminates against him as a non-believer.

We are referred to no case directly in point. In general, the cases distinguish between a right to believe, and a right to act on one's belief. *Cantwell* v. *Connecticut*, 310 U. S. 296, 303; *Craig* v. *State*, 220 Md. 590, 599. The first is absolute, the second is not. The petitioner is not compelled to believe or disbelieve, under threat of punishment or other compulsion. True, unless he makes the declaration of belief he cannot hold public office in Maryland, but he is not compelled to hold office. The Fourteenth Amendment does not prevent the states from establishing qualifications for office, at least where the qualifications are not based on such an unreasonable and improper classification as to be discriminatory. Cf. *Snowden* v. *Hughes*, 321 U. S. 1, *Wieman* v. *Updegraff*, 344 U. S. 183, and *Slochower* v. *Board of Education*, 350 U. S. 551. In the flag salute case, *Board of Education* v. *Barnette*, 319 U. S. 624, overruling *Minersville Dist.* v. *Gobitis*, 310 U. S. 586, some stress was laid upon the fact that school attendance was compulsory, and criminal penalties were imposed for non-attendance. Stress was also laid upon the lack of any showing of substantial or apparent relation to the public welfare, in the requirement of a salute to the flag of the United States.

In the absence of any direct authority on the point, we find it difficult to believe that the Supreme Court will hold

that a declaration of belief in the existence of God, required by Article 37 of our Declaration of Rights as a qualification for State office, is discriminatory and invalid. As Mr. Justice Douglas, speaking for a majority of the Court in *Zorach* v. *Clauson*, 343 U. S. 306, 313, said: "We are a religious people whose institutions presuppose a Supreme Being." The problem here is more basic than in any of the cases cited. An oath, predicated upon a belief in God, is a regular incident of judicial proceedings. There can be no doubt that at common law an atheist was incompetent as a witness. See Rapalje, *Witnesses*, §113 Wharton, *Criminal Evidence* (12th ed.), §750; 6 Wigmore, *Evidence* (3d ed.), §§1816-1828. See also *Atwood* v. *Walton*, 7 Conn. 66 (1828); *Thurstow* v. *Whitney*, 2 Cush. (Mass.) 104 (1848); *United States* v. *Miller*, 236 Fed. 798 (D. C., Wash.). There has been no constitutional or statutory abrogation of the common law rule in this State.

Article 39 of our Declaration of Rights provides: "That the manner of administering an oath or affirmation to any person, ought to be such as those of the religious persuasion, profession, or denomination, of which he is a member, generally esteem the most effectual confirmation by the attestation of the Divine Being." Article 21 provides that in all criminal prosecutions an accused shall have a right "to examine the witnesses for and against him on oath." It might well be contended that a person convicted upon unsworn testimony, or the testimony of an atheist, would be deprived of due process, or trial according to the "law of the land." Article 36 provides that "as it is the duty of every man to worship God in such manner as he thinks best acceptable to Him, all persons are equally entitled to protection in their religious liberty; * * * nor shall any person, otherwise competent, be deemed incompetent as a witness, or juror, on account of his religious belief; provided, he believes in the existence of God, and that under

His dispensation such person will be held morally accountable for his acts, and be rewarded or punished therefor either in this world or in the world to come." To the members of the Convention, as to the voters who adopted our Constitution, belief in God was equated with a belief in moral accountability and the sanctity of an oath. We may assume that there may be permissible differences in the individual's conception of God. But it seems clear that under our Constitution disbelief in a Supreme Being, and the denial of any moral accountability for conduct, not only renders a person incompetent to hold public office, but to give testimony, or serve as a juror. The historical record makes it clear that religious toleration, in which this State has taken pride, was never thought to encompass the ungodly.

The Federal Constitution itself is not lacking in references to an oath, or affirmation, as a qualification for office. See Art. I, sec. 3; Art. II, sec. 1; Art. VI, and Amendment IV. See also 5 U. S. C. A., §16. It would appear to be somewhat paradoxical if a Notary Public, who is given the power to administer oaths and certify thereto, under Code (1957), Art. 68, sec. 3 (see also Maryland Rule 5 c, and Code (1957), Art. 1, secs. 10, 11), might qualify for the office even if he disavowed belief in God and in the sanctity of the very oaths he administers. If it be assumed, as has been suggested, that the real deterrent to false swearing in our time, is not the belief in God but the fear of prosecution for perjury, we cannot say that the distinction between believers and non-believers is so patently inappropriate as a security for good conduct, as to make it invidious under the Fourteenth Amendment.

ORDER AFFIRMED, WITH COSTS.

APPENDIX B

Memorandum Opinion and Order

Law No. 9155

IN THE

CIRCUIT COURT OF MONTGOMERY COUNTY

MARYLAND

ROY R. TORCASO,

Plaintiff,

vs.

CLAYTON K. WATKINS,
Clerk of the Circuit Court
for Montgomery County, Maryland,

Defendant.

This is a Petition for a Writ of Mandamus filed by Roy R. Torcaso praying that Clayton K. Watkins, as Clerk of the Circuit Court for Montgomery County, Maryland, be commanded to issue to said petitioner his commission as a Notary Public in this State and County.

The defendant Clerk has filed a Demurrer through the Attorney General of Maryland and argument was had on this Demurrer on November 3rd, 1959, and Counsel for the petitioner and the Clerk have both filed briefs. Also the American Civil Liberties Union, as amicus curiae, has filed a memorandum in support of the petitioner's position,

by permission of the Court. All briefs have been read, as have the cases cited, and the matter has been carefully considered.

The petitioner alleges that he was refused his commission by the Clerk by reason of the fact that he would not take and subscribe the oath administered as follows: "In the presence of Almighty God, I, Roy R. Torcaso, do solemnly promise and declare that I will support the Constitution of the United States; and that I will be faithful and bear true allegiance to the State of Maryland, and support the Constitution and Laws thereof; and that I will, to the best of my skill and judgment, diligently and faithfully without partiality or prejudice execute the office of Notary Public of the State of Maryland in and for Montgomery County according to the Constitution and Laws of this State. I, Roy R. Torcaso, do declare that I believe in the existence of God." He claims that the oath required is in violation of the Constitution of Maryland and of the United States of America. The office involved is one created by Statute and the petitioner concedes that such an office is one of profit and trust; the oath is one always administered for like positions, and there is no dispute as to the facts involved.

In Maryland, Article 37 of the Declaration of Rights is a restriction applicable to those who wish to hold a position of profit or trust in this State. This restriction is a qualifying condition and seems most assuredly to be one which may be rightly imposed by a sovereign state in dealing with its own officials. This is a test for qualification, as are tests for qualification in other states, and also in dealing with such matters as defense when accused of crime, marriage and divorce laws, qualification to practice a profession; likewise in enjoyment of such privileges as attendance at State Universities and the use of public school buses, matters within the police powers of the state, and those of

internal administration. In dealing with subversive activities, our own case of *Shub* vs. *Simpson* at 196 Md. 177 clearly points out that Article 37 did not violate the oath of office prescribed by the Constitution since it was simply a declaration showing qualification for office and not an additional oath.

Maryland is a State steeped in religious freedom, founded and guided by those who believe in the existence of God. The members of the Legislature from the date of our founding have imposed some religious restriction on the right to hold an office of profit or trust. First, in 1776 the Declaration of Rights, at Article 35 stated that "no other test of qualification ought to be required on admission to any office of profit or trust than that of support and fidelity to this State and such oath of office as shall be directed by this Convention or the Legislature of this State and the declaration of belief in the Christian Religion." In 1851, at Article 34 of the Declaration of Rights, the restrictions were broadened to read, "and the declaration of belief in the Christian Religion; and if the party shall profess to be a Jew, his declaration shall be of his belief in a future state of reward and punishment," so that all faiths in addition to the Christian were then qualified. Now, any who believe in a supreme being may qualify. In the Convention of 1876, after much debate, all old provisions giving to the Legislature the right to exact oaths were deleted but the declaration of belief in the existence of God was retained so that Article 37 reads today as follows: "That no religious test ought ever to be required as a qualification for any office of profit or trust in this State, other than a declaration of belief in the existence of God; nor shall the Legislature prescribe any other oath of office than the oath prescribed by this Constitution." This matter is fully discussed in *Davidson* vs. *Brice*, 91 Md. 681, which is a case involving the office of County Treasurer of Anne Arundel County.

Appendix B

The office of Notary Public is an important one of profit and trust, and an entire Article of the Annotated Code of Maryland—Article 68—is devoted to this office and duties included therein. A Notary issues oaths in accordance with the law, gives certificates, receives proof of acknowledgments of all instruments of commerce, navigation, deeds and other paper writings: he can issue protests and must keep official records of his accounts. His is a privilege, and it being solely an internal office, the people of Maryland have imposed a qualification of belief in the existence of God as a condition precedent to the taking of his oath. The foundation for such a requirement was made clear when the Constitution of Maryland was adopted by Convention in Annapolis. The Preamble to the Constitution reads as follows: "We, the People of the State of Maryland, grateful to Almighty God for our civil and religious liberty, and taking into our serious consideration the best means of establishing a good Constitution in this State for the sure foundation and more permanent security thereof, declare:" (then follows Art. 1, etc.)

The Petitioner also argues that Article 37 violates the provision of the 1st and 14th Amendments to the Constitution of the United States. Suffice it to say, for reasons hereinbefore stated, the statutes which forbid acts detrimental to the community and places requirements for public office do not forbid religious beliefs, or even disbeliefs. The Complainant, Torcaso can continue his religious position without any interference from Maryland, either as to his present private employment or his citizenship, as neither is being interfered with.

The Court finds no conflict with the United States Constitution or the Constitution of Maryland and no authority having been cited to the contrary, the Court feels that Art. 37 of the Declaration of Rights of Maryland imposes

a qualification that the petitioner has not met and his petition for Writ of Mandamus will be, and the same is hereby, denied and the Petition is hereby dismissed.

Ralph G. Shure
JUDGE of the Circuit Court
for Montgomery County, Maryland

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 373

ROY R. TORCASO,

Appellant,

v.

CLAYTON K. WATKINS,
CLERK OF THE CIRCUIT COURT FOR
MONTGOMERY COUNTY, MARYLAND,

Appellee.

ON APPEAL FROM THE COURT OF APPEALS OF MARYLAND

MOTION TO DISMISS OR AFFIRM

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IN THE

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ROY R. TORCASO,

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CLAYTON K. WATKINS,
CLERK OF THE CIRCUIT COURT FOR
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Appellee.

ON APPEAL FROM THE COURT OF APPEALS OF MARYLAND

MOTION TO DISMISS OR AFFIRM

Appellee, pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, moves to dismiss or affirm the appeal on the ground that the question is so unsubstantial as not to warrant further argument.

QUESTIONS PRESENTED

1. Does Article 37 of the Declaration of Rights of the Maryland Constitution, which requires "a declaration of belief in the existence of God" as a qualification for "any office of profit or trust in this State", violate the ban contained in the First Amendment of the Constitution of the United States respecting the establishment of religion?

2. Has the Appellant been denied due process of law or equal protection of the law as guaranteed by the Fourteenth Amendment to the United States Constitution?

STATEMENT OF FACTS

The Appellee adopts the Appellant's Statement of Facts.

ARGUMENT

I.

The Appellant contends that the requirement of a belief in the existence of God as a condition to holding public office in Maryland violates the ban on the establishment of religion contained in the First Amendment to the United States Constitution because, it is contended, the provision of the Maryland Declaration of Rights prefers some religions over others, specifically theistic religions, over those which are non-theistic.

From the beginning of the history of our nation, there has been a realization and recognition of the existence of a Supreme Being in the conduct of our affairs. It is clearly recognized in the Declaration of Independence, where it is stated:

> "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable rights, that among these are life, liberty and the pursuit of happiness. * * *
>
> "We, therefore, the representatives of the United States of America, in General Congress assembled, appealing to the Supreme Judge of the world for the rectitude of our intentions, do, in the name and by authority of the good people of these Colonies, solemnly publish and declare * * *; and
>
> "For the support of this declaration, with a firm reliance on the protection of Divine Providence, we mutually pledge to each other our lives, our fortunes and our sacred honor."

An examination of the constitutions of the various states reveals a consistent recognition of religious obligations. The Maryland Constitution, in its preamble, states as follows:

> "We, the People of the State of Maryland, grateful to Almighty God for our civil and religious liberty, and taking into our serious consideration the best means of establishing a good Constitution in this State for the sure foundation and more permanent security thereof, declare: * * *".

For a thorough analysis of State Constitutional provisions relating to the recognition of a Supreme Being, see the unanimous opinion of this Court written by Mr. Justice Brewer in *Church of the Holy Trinity v. United States*, 143 U.S. 457, 36 L. Ed. 226. Mr. Justice Brewer concluded:

> "There is no dissonance in these declarations. There is a universal language pervading them all, having one meaning; they affirm and reaffirm that this is a religious nation. These are not individual sayings, declarations of private persons; they are organic utterances; they speak the voice of the entire people. * * *".

(It is important to note that Mr. Justice Brewer quoted the very provisions of the Maryland Declaration of Rights now sought to be held invalid.)

More recently, the majority of this Court in *Zorach v. Clauson*, 343 U.S. 306, 96 L. Ed. 954, speaking through Mr. Justice Douglas, stated as follows:

> "We are religious people whose institutions presuppose a Supreme Being. We guarantee the freedom to worship as one chooses. We make room for as wide a variety of beliefs and creeds as the spiritual needs of man deem necessary. We sponsor an attitude on the part of government that shows no partiality to any one group, and that lets each flourish according to the zeal of its adherents and the appeal of its dogma. When the State encourages religious instruction or cooperates

> with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions. For it then respects the religious nature of our people and accommodates the public service to their spiritual needs. To hold that it may not would be to find in the Constitution a requirement that the government show a callous indifference to religious groups. That would be preferring those who believe in no religion over those who do believe. * * *".

Courts, including this Court, have functioned upon the assumption of the sancity of an oath. Public officers, including the members of this Honorable Court, qualify by being sworn in office. Title 28, Section 453, U.S.C.A., provides as follows:

> "Each justice or judge of the United States shall take the following oath or affirmation before performing the duties of his office: 'I, ..., do solemnly swear (or affirm) that I will administer justice without respect to persons, and do equal right to the poor and to the rich, and that I will faithfully and impartially discharge and perform all the duties incumbent upon me as ..... according to the best of my abilities and understanding, agreeably to the Constitution and laws of the United States. *So help me God*'." (Emphasis supplied.)

The oath required of the Appellant is no greater than the oath taken by the members of this Court, as well as the members of the other courts of the United States. Our nation has, in its everyday affairs, officially recognized the existence of God and there has been legislative sanction for the same. Our coins contain the inscription "In God We Trust" (Title 31, U.S.C.A., Section 324). Our Federal courts open with the supplication, "God save the United States and this Honorable Court". See *Zorach v. Clauson, supra.* The pledge of allegiance to the Flag of the United States recognizes that this is "One Nation under God"

(Title 36, U.S.C.A., Section 172). The postage stamp which accompanied this document expounds as the American credo "In God is our Trust". Likewise, in our National Anthem we reverently sing: "And this be our motto, 'in God is our trust'."

The reading of the Lord's Prayer, without comment, by school children has been judicially approved. See *Doremus v. Board of Education*, 75 A. 2d 880 (N.J.); appeal dismissed 342 U.S. 429, 96 L. Ed. 475.

The drafters of the Constitution of the United States never conceived that a belief in the existence of God as a qualification for public office was repugnant to the principles of fundamental liberty. See Story, *Commentaries on the Constitution of the United States*, Sections 1870-1878. To have attempted to require states to hold religion in utter indifference would have created universal disapprobation, if not universal indignation, at the time of the adoption of the Constitution. See Story, *supra*, Section 1874.

In *Davis v. Beason*, 133 U.S. 333, 33 L. Ed. 637, this Court upheld an Act of Congress outlawing bigamy and polygamy in the territory of Idaho. In addition, the Act provided that anyone who failed to take an oath to the effect that he did not belong to any order, organization or association which practiced or believed in bigamy or polygamy could not vote or qualify to hold public office. This Court held that the Act did not violate the provisions of the First Amendment to the Constitution and stated as follows:

> "* * * The First Amendment to the Constitution, in declaring that Congress shall make no law respecting the establishment of religion, or forbidding the free exercise thereof, was intended to allow everyone under the jurisdiction of the United States to entertain such notions respecting his relations to his Maker and the duties they impose as may be approved by his judg-

ment and conscience, and to exhibit his sentiments in such form of worship as he may think proper, not injurious to the equal rights of others, and to prohibit legislation for the support of any religious tenets, or the modes of worship of any sect. * * *".

To the same effect, see *Reynolds v. United States,* 98 U.S. 145, 25 L. Ed. 244, and *Murphy v. Ramsey,* 114 U.S. 15, 29 L. Ed. 47.

The Appellant urges that the provisions of Article VI, Section 3, of the United States Constitution, which prohibits among other things a religious test as a qualification to "any office or public trust under the United States" is applicable to the several states. This argument must fall by its own weight since the prohibition expressly applies only to offices held under the national government. Its purpose was to cut off forever any pretense of alliance between any church and the national government. This is particularly true when this prohibition is considered with the requirement that all legislative, executive and judicial officers of both the United States and of the several states are required to be bound by an oath or affirmation to support the Constitution of the United States. *Expressio unius est exclusio alterius.*

It is respectfully submitted that the provisions of the Maryland Declaration of Rights now under attack in this Court are so fundamental to the beliefs of the people of the State of Maryland, as well as the nation as a whole, that it does not require further argument to find that these provisions do not tend toward the establishment of a religion within the State of Maryland.

II.

The Appellant avers that the mandate of the Fourteenth Amendment provides that no state shall deny to any person

the equal protection of the law and, therefore, bars the State from granting privileges to some persons which it withholds from others unless a constitutionally reasonable distinction can be made between those favored and those not favored. It has long been recognized by this Court that it is essential to the independence of the states that they retain the power to prescribe the qualifications of their own officers, the tenure of their appointments and the manner of their appointments or elections, and that the states should be free from external interference except so far as plainly and clearly provided by the Constitution of the United States.

In *Taylor v. Beckham*, 178 U.S. 548, 44 L. Ed. 1187, this Court refused to assume jurisdiction to review the determination of the state courts relative to the election of the Governor and the Lieutenant-Governor of the State of Kentucky. The Court stated that the unsuccessful litigant in the state court had not been denied due process of law or equal protection of the law. Therefor, it is clear that where a state legally establishes qualifications for office, that state shall have the sole determination of whether a person has met those qualifications for office.

More recently, this Court, in *Snowden v. Hughes*, 321 U.S. 1, 88 L. Ed. 497, reaffirmed this conclusion by stating:

> "More than forty years ago this Court determined that an unlawful denial by state action of a right to state political office is not a denial of a right of property or of liberty secured by the due process clause. Taylor & Marshall v. Beckham, 178 U.S. 548, 44 L. Ed. 1187, 20 S. Ct. 890, 1009. Only once since has this Court had occasion to consider the question and it then reaffirmed that conclusion, Cave v. Missouri, 246 U.S. 650, 62 L. Ed. 921, 38 S. Ct. 334, as we reaffirm it now."

Clearly, the State of Maryland may establish qualifications for office and such qualifications are not prohibited by the Fourteenth Amendment. Under the Constitution of the State of Maryland, disbelief in a Supreme Being and the denial of any moral accountability for conduct is a reasonable basis for classification to render the person incompetent to hold public office. Furthermore, the Appellant seeks to be afforded the privilege of becoming a Notary Public, who is given power to administer oaths and certify thereto (Article 68, Section 3, Annotated Code of Maryland, 1957 Ed.), when he, himself, has disavowed belief in God and in the sanctity of the very oath he intends to administer. For these reasons, it is respectfully urged that the Appellant has not been deprived of due process of law or equal protection of the law, as alleged.

CONCLUSION

For the reasons above stated, it is respectfully submitted that by his appeal Appellant presents no substantial question for further argument in this Court, and that the opinion and judgment of the Court of Appeals of Maryland should be affirmed, or, in the alternative, the appeal should be dismissed.

Respectfully submitted,

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No. 373

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

ROY R. TORCASO, *Appellant*,

v.

CLAYTON K. WATKINS, Clerk of the Circuit Court for Montgomery County, Maryland, *Appellee*.

On Appeal from the Court of Appeals of Maryland

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 373

ROY R. TORCASO, *Appellant*,

v.

CLAYTON K. WATKINS, Clerk of the Circuit Court for Montgomery County, Maryland, *Appellee*.

On Appeal from the Court of Appeals of Maryland

BRIEF FOR APPELLANT

OPINIONS BELOW

The opinion of the Court of Appeals of the State of Maryland (R. 12-19) is reported at 223 Md. 49, 162 A. 2d 438. The opinion of the Circuit Court for Montgomery County, Maryland (R. 7-10) has not been reported.

JURISDICTION

The judgment of the Court of Appeals of Maryland was entered on June 30, 1960 (R. 12). An amended notice of appeal therefrom was filed on August 16, 1960 (R. 21). The jurisdictional statement was filed on August 31, 1960, and probable jurisdiction was noted on November 7, 1960,

The jurisdiction of the Supreme Court to review the judgment of the Court of Appeals of Maryland rests upon 28 U.S.C. Sec. 1257(2).

CONSTITUTIONAL PROVISIONS INVOLVED

Article 37 of the Declaration of Rights of the Maryland Constitution, the validity of which is here drawn into question, provides as follows:

> "That no religious test ought ever be required as a qualification for any office of profit or trust in this State, other than a declaration of belief in the existence of God; nor shall the Legislature prescribe any other oath of office than the oath prescribed by this Constitution."

This Article of the Maryland Constitution is challenged as violating the following provisions of the United States Constitution:

FIRST AMENDMENT

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . ."

FOURTEENTH AMENDMENT

> "Section 1. . . . nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

ARTICLE VI, (Clause three)

> "The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution; but no religious Test shall ever be required as a Qualification to any office or public Trust under the United States."

QUESTIONS PRESENTED

Is that portion of Article 37, Declaration of Rights, Maryland Constitution which, as interpreted by the Maryland Court of Appeals, requires a "declaration of belief in the existence of God" as a "religious test" for an "office of profit or trust", in conflict with the Constitution of the United States, specifically:

1. The ban in the First Amendment, made applicable to the states by the Fourteenth Amendment, on laws respecting an establishment of religion?

2. The provision in the First Amendment, made applicable to the states by the Fourteenth Amendment, protecting the free exercise of religion?

3. The due process and equal protection clauses of the Fourteenth Amendment?

4. The ban on religious tests in Article VI?

STATEMENT OF THE CASE

The undisputed facts of this case, as set forth in the Petition, (R. 1-5), to which Appellee demurred, (R. 6-7), are as follows:

Appellant, a citizen of the United States of America and resident of Montgomery County, State of Maryland, made a proper application for a commission as a Notary Public in and for Montgomery County, State of Maryland. The application was properly endorsed by the Honorable Edward S. Northrop, State Senator for Montgomery County, and forwarded by him to the Governor of the State. On or about the 22nd of June, 1959, the Governor appointed Appellant a Notary Public in and for Montgomery County, State of Maryland.

In accordance with instructions received from the Office of the Secretary of State of Maryland, Appellant went to the office of the Clerk of the Circuit Court for Montgomery

County, Appellee herein, to obtain his commission and qualify for office. At that time, Appellant was requested to take and subscribe to the following oath and declaration:

"State of Maryland, Montgomery County ss:

In the presence of Almighty God, I, Roy R. Torcaso, do solemnly promise and declare that I will support the Constitution of the United States; and that I will be faithful and bear true allegiance to the State of Maryland, and support the Constitution and Laws thereof; and that I will, to the best of my skill and judgment, diligently and faithfully without partiality or prejudice execute the office of

Notary Public of
The State of Maryland
in and for
Montgomery County

according to the Constitution and Laws of this State.

I, Roy R. Torcaso, do declare that I believe in the existence of God.

_____

Sworn to and subscribed before me, Clerk of the Circuit Court of Montgomery County, at Rockville, Maryland, this_____day of_____AD, 19____.

TEST:

_____Clerk"

Appellant stated that he would not declare his belief in the existence of God. Whereupon, Appellee refused to render the commission to Appellant.

Appellant is, and was at all times, willing to take and subscribe the affirmation for the office of Notary Public as contained in Article I, Section 6 of the Constitution of the State of Maryland (R. 4), which section sets forth the form

of Oath or Affirmation required of every person elected or appointed to any office of profit or trust in Maryland. Said form Oath or Affirmation is devoid of any reference to God, Supreme Being, or religious belief.

Appellant sought relief from Appellee's refusal by Petition for Writ of Mandamus in the Circuit Court for Montgomery County, Maryland (R. 1-5). The Appellee demurred (R. 6-7). The Court granted the demurrer and dismissed the Petition (R. 10) on the ground that Article 37, Declaration of Rights, is " . . . simply a declaration showing qualification for office . . ." (R. 8) and is a " . . . restriction applicable to those who wish to hold a position of profit or trust in this State. This restriction . . . seems most assuredly to be one which may be rightly imposed by a sovereign state in dealing with its own officials." (R. 8.)

Holding that the position of Notary Public is a "privilege", the Court stated "the people of Maryland have imposed a qualification of belief in the existence of God as a condition precedent to the taking of his oath." (R. 9.) It further held that Appellant " . . . can continue his religious position without any interference from Maryland either as to his present private employment or his citizenship, as neither is being interfered with." (R. 10.)

In the Court of Appeals, Appellant urged that Article 37 did not authorize, as a matter of state law, the clerk's refusal to issue the oath, and reiterated his Federal constitutional question. The Court of Appeals affirmed the trial court's decision. Its opinion discussed at considerable length, and rejected, Appellant's non-Federal contention (R. 13-17). It construed Article 37 as requiring an oath declaring a belief in God of every state officer. The Court also held that the statute did not violate the Federal Constitution.

It primarily based its decision on the ground that Appellant " . . . is not compelled to believe or disbelieve, under

threat of punishment or other compulsion. True, unless he makes the declaration of belief he cannot hold public office in Maryland, but he is not compelled to hold office". (R. 17.) Propriety for such a requested declaration of belief as contained in Article 37 is found by the Court of Appeals on the asserted grounds that said qualification for office is " . . . not based on such an unreasonable and improper classification as to be discriminatory". (R. 17.)

SUMMARY OF ARGUMENT

I. The Maryland constitutional provision requiring a belief in the existence of God as a condition to holding state office violates the protection of the First Amendment, made applicable to the states by the Fourteenth, guaranteeing the free exercise of religion. That guarantee extends to minority, unpopular and unconventional beliefs, including that of a non-theistic nature. Belief, necessarily including non-belief, is afforded the absolute and unqualified protection of this guarantee. A disqualification based upon religious belief is a direct infringement on religious liberty and long held by this Court as unconstitutional. If Government may validly bar one from office on the basis of non-belief, there is no reason why it may not next require a specific belief as a qualification for the office. It may not do either, for each would infringe upon the inviolate area of freedom of religious belief. *ZORACH* v. *CLAUSON*, 343 U.S. 306, is NOT to the contrary.

II. The Maryland constitutional provision violates the ban in the First Amendment against the establishment of religion. Religious tests have long been the hallmark of religious establishment and were considered particularly offensive by the framers of the Constitution. This provision favors theistic religions over non-theistic religions. Even if that were not so, and if the effect of the provision were

to treat all religions alike, it would violate the duty of neutrality between belief and non-belief.

III. The Maryland constitutional provision constitutes a test oath, specifically prohibited by Article VI of the United States Constitution. It was the intent of the framers of the Constitution to include within this prohibition all offices, state and federal alike, since the test oath was well recognized as both an infringement upon the free exercise of religion and as an aid to the establishment of religion. Any doubt as to the application of this ban to the states was removed with passage of the First and Fourteenth Amendments; freedom of religion in the First Amendment encompasses the prohibition against the repugnant test oath, and the entire protection of religious liberty was extended to the states by the Fourteenth Amendment.

IV. The Maryland constitutional provision denies Appellant due process of law and equal protection of the laws, in violation of the Fourteenth Amendment since it is unresonable and discriminatory. The discrimination against Appellant based solely on his religious beliefs is not validated by classifying the office of Notary Public as a "privilege" rather than a "right." It is the nature of the discrimination rather than the label applied to the position which is determinative. The issue is whether the qualification imposed is reasonable, proper and nondiscriminatory. A qualification barring one from public office based on his religious belief alone is unreasonable, arbitrary and highly discriminatory. Government has not the right even to inquire into the nature of one's beliefs, let alone impose sanctions upon him for entertaining them. This discrimination is not made reasonable by the fact that a Notary Public must administer oaths in the course of his duties. One not holding theistic beliefs is qualified to give evidence in a truthful manner, and virtually all of the several states so recognize.

ARGUMENT

I

ELIGIBILITY FOR A STATE OFFICE CONDITIONED UPON A BELIEF IN THE EXISTENCE OF GOD CONSTITUTES A LAW PROHIBITING THE FREE EXERCISE OF RELIGION IN VIOLATION OF THE FIRST AMENDMENT, MADE APPLICABLE TO THE STATES BY THE FOURTEENTH AMENDMENT.

As authoritatively construed by the Court of Appeals of Maryland, Article 37 of that State's Constitution establishes as a prerequisite for holding public office that the applicant take an oath that he believes in God. Since Article 37 directly attacks appellant's beliefs, which this Court has held are entitled to absolute protection, *Cantwell* v. *Connecticut*, 310 U.S. 296, 303, it is appropriate to consider at the outset Maryland's interference with his right to the free exercise of religion.

A. Freedom for Non-Theistic Belief

> "The historical record makes it clear that religious toleration, in which this State has taken pride, was never thought to encompass the ungodly." *Torcaso* v. *Watkins*, Maryland Court of Appeals decision. (R. 19).

The above-quoted statement by the Court below is a significant premise upon which its decision is grounded. However, it is apparent from the language immediately preceding the quoted sentence that the court is referring to the "historical record" of the State of Maryland, not of the United States.

While the Court of Appeals of Maryland grants that "It is well settled that the provisions of the Federal Constitution are supreme, even over a provision of the State Constitution" (R. 17), that Court chose to ignore the decisions of this Court which establish that the protection of the

religious freedom guarantee of the First Amendment must of necessity "encompass the ungodly". It is clear that its protection extends to minority, unpopular and unconventional beliefs. *Cantwell* v. *Connecticut*, 310 U.S. 296; *United States* v. *Ballard*, 322 U.S. 78; *Terminello* v. *City of Chicago*, 337 U.S. 1; *Near* v. *Minnesota*, 283 U.S. 697; *West Virginia Board of Education* v. *Barnette*, 319 U.S. 624; *Kunz* v. *New York*, 340 U.S. 290.

We submit that the notion that religious freedom does not "encompass the ungodly" (R. 19) is treacherous to the religious liberty of all.

> "Freedom of thought which includes freedom of religious belief is basic in a society of free men, *West Virginia State Bd. of Educ.* v. *Barnette*, 319 U.S. 624. It embraces the right to maintain theories of life and death and of the hereafter, which are rank heresy to followers of the orthodox faiths. *Heresy trials are foreign to our Constitution. Men may believe what they cannot prove.*" (Emphasis added.) *United States* v. *Ballard*, 322 U.S. 78, 86.

It cannot and should not be otherwise. Once the door is opened to an official orthodoxy, even if it is only that of a belief in God, the way is cleared for heresy trials. Then we stumble into the labyrinth of determining which God is being sworn to.

The framers of our Constitution and Bill of Rights were wise beyond their time in not attempting to define religion. It is to be noted that they did not put the name of God, Christ, or the Christian religion into the Constitution, but purposefully and designedly omitted them, not because of any hostility to the Christian religion (to which most adhered), but because of their respect, and faith that theistic religions' inherent merits would survive best without official backing. I Stokes, *Church and State in the United States* (1950) 523, 602-612.

This problem was raised when the Bill of Rights was considered, but a plan to insert the words "Jesus Christ" in the preamble to the bill establishing religious freedom in the United States was rejected by a large majority "in proof that they meant to comprehend within the mantle of its protection, the Jew and the Gentile, the Christian and the Mohammed, the Hindoo, and the Infidel of every denomination." Hubbard, *An American Bible*, quoting letter of Thomas Jefferson, p. 101.

This Court has recognized the fact that atheists are encompassed within the purview of religious freedom.

> "On the other hand, other language of the [First] Amendment commands that New Jersey cannot hamper its citizens in the free exercise of their own religion. Consequently, it cannot exclude individual Catholics, Lutherans, Mohammedans, Baptists, Jews, Methodists, Non-Believers, Presbyterians, or the members of any other faith, *because of their faith or lack of it* from receiving the benefits of public welfare legislation." (Court's own italics.) *Everson* v. *Bd. of Educ.*, 330 U.S. 1, 16.

"Atheist" has long been an epithet which contending religious groups have cast upon one another. See Morris R. Cohen, *Atheism* in Encyclopedia of Social Sciences (1948). Are Buddhists, Taoists and believers of other non-theistic religions to be exempt? See 19 Enc. Britt. (14th Ed.) page 111.[1]

The judgment below cannot be sustained by distinguishing between those who believe something and those who believe nothing. The Record does not show the nature of appellant's beliefs, and it would be offensive to put them on trial. We think they are irrelevant. This Court has long held that it is not the function of the Courts to enter this domain. *Watson* v. *Jones*, 13 Wall. 679. See also *Vidal* v.

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[1] The wide range of non-theistic beliefs and religions are discussed in the *Amicus Curiae* brief of the American Ethical Union filed herein.

Girard's Executors, 2 How. 127,198; *Joseph Burstyn Inc.* v. *Wilson*, 343 U.S. 495. In *Fowler* v. *Rhode Island*, 345 U.S. 67, 70, it was held to be

> . . . "no business of courts to decide that what is a religious practice or activity for one group is not religion under the protection of the First Amendment."

Nor is it the business of any other branch of government. The Fathers of the Constitution "fashioned a charter of government which envisaged the widest possible toleration of views. Man's relation to his God was made no concern of the state. He was granted the right to worship as he pleased and to answer to no man for the verity of his religious views." *United States* v. *Ballard*, 322 U.S. 78, 87.

B. The Absoluteness of the Right of Belief and Non-Belief

There can be no doubt that the religious freedom guaranteed by the First Amendment to the Federal Constitution does not embrace absolute "freedom to act," and that all conduct "remains subject to regulation for the protection of society." *Cantwell* v. *Connecticut, supra*, at 303-304. Concededly, the First Amendment does not preclude proscription of polygamy, breaching the peace, or child labor. *Reynolds* v. *United States*, 98 U.S. 145. *Davis* v. *Beason*, 133 U.S. 333; *Chaplinsky* v. *New Hampshire*, 315 U.S. 568; *Prince* v. *Massachusetts*, 321 U.S. 158.

We may even concede for the purpose of this case that the right to express religious belief may not be absolute and might conceivably be constitutionally subject to restriction under the police power, provided it poses a clear and present danger to an important communal interest. Cf. *Chaplinsky* v. *New Hampshire, supra; Kunz* v. *New York, supra.*

But this case involves neither conduct nor expression; it involves only belief. The oath required of Roy Torcaso makes no reference to conduct or expression. The unconstitutionality of Article 37 is apparent as soon as it is rec-

ognized that its direct impact is on beliefs. If one thing is established by this Court's decisions under the First and Fourteenth Amendments, both in the political and religious area, it is that beliefs are inviolate. As Mr. Justice Roberts said for a unanimous Court in the *Cantwell* case, *supra*, at 303-304:

> "The constitutional inhibition of legislation on the subject of religion has a double aspect. On the one hand, it forestalls compulsion by law of the acceptance of any creed or the practice of any form of worship. Freedom of conscience and freedom to adhere to such religious organization or form of worship as the individual may choose cannot be restricted by law. On the other hand, it safeguards the free exercise of the chosen form of religion. Thus the Amendment embraces two concepts—freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be. Conduct remains subject to regulation for the protection of society."

This distinction has been recognized since the first case in which this Court examined the character of religious liberty guaranteed by the Constitution. In *Reynolds* v. *United States*, 98 U.S. 145 it was said at 164, "Congress was deprived of all legislative power over mere opinion, but was left free to reach actions which were in violation of social duties or subversive of good order", and at 166. "Laws are made for the government of actions, and while they cannot interfere with mere religious beliefs and opinions, they may with practices." Even earlier, in *Watson* v. *Jones*, 13 Wall. 679, decided without reference to constitutional inhibitions,[2] it was declared as a general principle:

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[2] See *Kedroff* v. *St. Nicholas Cathedral*, 344 U.S. 94, 114-16, where this passage together with its corollary (renunciation of state power to adjudicate religious controversies in passing on the right to church property) was quoted and approved and the rights proclaimed were held "now . . . to have federal constitutional protection as a part of the free exercise of religion against state interference."

"In this country the full and free right to entertain any religious belief, to practice any religious principle, and to teach any religious doctrine which does not violate the laws of morality and property, and which does not infringe personal rights, is conceded to the support of no dogma, the establishment of no sect."[3]

C. Disqualification for Public Office as a Restriction on Religious Liberty

"The petitioner is not compelled to believe or disbelieve, under threat of punishment or other compulsion. True, unless he makes the declaration of belief he cannot hold public office in Maryland, but he is not compelled to hold office." *Torcaso* v. *Watkins*, Maryland Court of Appeals decision (R. 17).

A disqualification for public office because of religious belief or non-belief constitutes an impairment of religious liberty and an interference with the free exercise of religion. Historically, along with compulsory taxation for religion, disqualification for public office was, prior to the establishment of our Constitution, the most common means of impairing religious freedom.[4]

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[3] On only one occasion has this Court faltered in its adherence to this principle. In *American Communications Association* v. *Douds*, 339 U.S. 382, and *Osman* v. *Douds*, 339 U.S. 846, the Court was equally divided on the constitutionality of so much of the "non-communist affidavit", 61 Stat. 136, 146, 29 U.S.C. §§ 141, 159(h), as required an officer to swear "that he does not *believe* in, and is not a member of any organization that *believes* in . . . the overthrow of the United States Government by force or by illegal or unconstitutional methods." (Emphasis added) But even the opinion of the Chief Justice which sustained the oath in its entirety acknowledged that "one may not be imprisoned or executed because he holds particular beliefs." *American Communications Association* v. *Douds*, 339 U.S. at 408. It also construed the oath narrowly to avoid constitutional questions inherent in a broader prohibition of beliefs than in the overthrow of government *as presently constituted* by force, etc.

[4] See pages 22-26, infra.

This Court has recognized that disqualification for public office on the ground of religious belief violates the Bill of Rights.

> "Congress may not enact a regulation providing that no Republican, Jew or Negro shall be appointed to Federal office, or that no Federal employee shall attend Mass or take any active part in missionary work." *United Public Workers* v. *Mitchell*, 330 U.S. 75, 100.

The same principle was stated in *In re Summers*, 325 U.S. 568, wherein the Court said at p. 571:

> "... It is said that the action of the Supreme Court of Illinois is contrary to the principles of that portion of the First Amendment which guarantees the free exercise of religion. Of course, under our Constitutional system, men could not be excluded from the practice of law, or indeed from following any other calling, simply because they belong to any of our religious groups, whether Protestant, Catholic, Quaker or Jewish, assuming it conceivable that any state of the Union would draw such a religious line."

Again, at the present Term, in *Shelton* v. *Tucker*, 364 U.S. 479, this Court struck down a statute which interfered with the First Amendment rights of teachers. The Court deemed especially significant the potential impact of the legislation on their continued employment.

The same Bill of Rights that protects the Catholic and Jew from discrimination in the holding of public office or practice of law by reason of their beliefs in the field of religion protects the non-theist. Were it otherwise, we would be compelled to concede the existence of two First Amendments, one for those who believe in God and one for those who do not—obviously no such state of affairs exists and no such concession is necessary. Further emphasis of this concept is found in Mr. Justice Jackson's compelling prediction that "The day that this country ceases to be free for irreligion it will cease to be free for religion—except for the sect that can win political power." *Zorach* v. *Clauson*, 343 U.S. 306, 323, 325 (dissenting opinion).

If a State can constitutionally bar from public office those who refuse to profess a belief in God, it can require applicants for public office to define what they mean by "God" and can bar those whose definition does not correspond to that espoused by the public official passing upon the qualifications. The effect would be to declare that "the Civil Magistrate is a competent judge of Religious truth," which is "an arrogant pretension falsified by the contradictory opinions of Rulers in all ages". (Madison's *Memorial and Remonstrance,* set forth as Appendix to the *Everson* case, 330 U.S. 1 at 63, 67).

Jefferson pointed out in the Virginia Bill for Religious Liberty that to entrust a civil officer with the power to pass upon religious beliefs "at once destroys all religious liberty, because he . . . will make his opinions the rule of judgment, and approve or condemn the sentiments of others only as they shall square with or differ from his own". To assure religious liberty for all, civil government must be adjudged to be without power to pass on religious beliefs, directly or as an incident to determining qualifications for public office.

> "The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials, and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.
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> "But freedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of existing order.

"If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us." (Emphasis supplied.) *West Virginia Board of Education* v. *Barnette,* 319 U.S. 624, 638, 642.

This contention, that since the Appellant has a choice either to maintain his religious beliefs or to accept the post of notary public with the price of giving up his religious beliefs, was effectively answered by the Court in *Speiser* v. *Randall,* 357 U.S. 513, 518, where the Court held that this type of choice did infringe on First Amendment freedoms. There the Court said:

> "It has been said that Congress may not by withdrawal of mailing privileges place limitations upon the freedom of speech which if directly attempted would be unconstitutional. See Hannegan v. Esquire, Inc., 327 U.S. 146, 156; cf. State ex rel. Milwaukee S. D. Pub. Co. v. Burleson, 255 U.S. 407, 430-431 (Brandeis, J., dissenting). This Court has similary rejected the contention that speech was not abridged when the sole restraint on its exercise was withdrawal of the opportunity to invoke the facilities of the National Labor Relations Board, American Communications Assoc. v. Douds, 339 U.S. 382, 402, or the opportunity for public employment, Wieman v. Updegraff, 344 U.S. 183. So here, the denial of a tax exemption for engaging in certain speech necessarily will have the effect of coercing the claimants to refrain from the proscribed speech."

D. *Zorach* v. *Clauson* Discussed

The Court below did not face the religious guarantees of the First Amendment except for one quotation from *Zorach* v. *Clauson,* 343 U.S. 306.

Its rationale is set forth in the following portions of its decision:

> "In the absence of any direct authority on the point, we find it difficult to believe that the Supreme Court will hold that a declaration of belief in the existence of God, required by Article 37 of our Declaration of Rights as a qualification for State office, is discriminatory and invalid. As Mr. Justice Douglas, speaking for a majority of the Court in *Zorach* v. *Clauson*, 343 U.S. 306, 313, said: "We are a religious people whose institutions presuppose a Supreme Being." (R. 18.)
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> * * * *
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> "To the members of the Convention, as to the voters who adopted our Constitution, belief in God was equated with a belief in moral accountability and the sanctity of an oath. We may assume that there may be permissible differences in the individual's conception of God. But it seems clear that under our Constitution disbelief in a Supreme Being, and the denial of any moral accountability for conduct, not only renders a person incompetent to hold public office, but to give testimony, or serve as a juror. The historical record makes it clear that religious toleration, in which this State has taken pride, was never thought to encompass the ungodly." (R. 19.)

Nothing that was said or decided in *Zorach* v. *Clauson*, *supra*, endorses the extreme proposition that atheists are beyond the pale of the First Amendment. It is well to quote in context the passage from the *Zorach* case relied on by the Maryland Court of Appeals:

> "We are a religious people whose institutions presuppose a Supreme Being. We guarantee the freedom to worship as one chooses. We make room for as wide a variety of beliefs and creeds as the spiritual needs of man deem necessary. We sponsor an attitude on the part of government that shows no partiality to any one group and that lets each flourish according to the zeal of its adherents and the appeal of its dogma." 343 U.S. 306 at 313.

Viewed as a whole, this language bespeaks governmental toleration of religious beliefs of every kind, and does not license their repression. Non-theistic beliefs also arise from the spiritual needs of man, as the Amicus brief herein of the American Ethical Union abundantly documents.

Nor does the holding of the *Zorach* case aid Appellee. The Court there found that the record supported no claim of governmental coercion in the operation of the released time plan. 343 U.S. at 311-12. It was emphasized that New York was merely accommodating itself to religion. Id. 314-15. But we have already shown that disqualification from public office constitutes coercion in a constitutional sense. Reversal of the New York plan, it was said, would constitute hostility to religion. Id. at 314-15. But Appellent does not ask that Maryland or this Court prefer "those who believe in no religion over those who do believe." Id. at 314. He merely seeks equal treatment. Yet Maryland would deny him the right to serve in public office, or, as the Court below makes clear, to serve as a juror or witness. (R. 18) Plainly, it is much more than mere accommodation to believers for the state to deprive non-believers of all public trust or responsibility. The court in *Zorach* was careful to state that "Government may not . . . use secular institutions to force one or some religion on any person". Id. at 314. By Article 37, Maryland does just that, unless public office itself is not a "secular institution". Indeed, since the means which the state has adopted is the test, the vice goes deeper. For *Zorach* reaffirms that government may not make a religious observance compulsory. An individual's declaration that he believes in God, though not as elaborate as a church service, is indisputably a "religious observance." Compare *West Virginia Board of Education* v. *Barnette,* 319 U.S. 624, 633-34.

The very sentence on which the Court below so heavily relied will not support the burden sought to be placed on it.

Surely the proposition that "We are a religious people whose institutions presuppose a Supreme Being" does not imply that the state may impose disabilities on those who do not believe in a Supreme Being. To disavow hostility to religion, Id. at 314-315, is not to approve hostility to the nonreligious (even if it be assumed that belief in a Supreme Being is a necessary element of Religion.) If liberty of dissent means anything, it means this.

Reynolds v. *United States*, 98 U.S. 145 is apposite. The decision there rested in large measure on the central role of monogamy in our social life:

> ". . . Marriage, while from its nature a sacred obligation, is nevertheless, in most civilized nations, a civil contract, and usually regulated by law. Upon it society may be said to be built, and out of its fruits spring social relations and social obligations and duties, with which government is necessarily required to deal. In fact, according as monogamous or polygamous marriages are allowed do we find the principles on which the Government of the People, to a greater or less extent rests." Id. at 165.

In the very next paragraph of the opinion it is expressly avowed that laws "cannot interfere with mere religious belief and opinions." (at 166) This plainly is a recognition that even beliefs which are contrary to the whole fabric of our society are beyond governmental interference.

When some of the unorthodox beliefs and opinions which have been given constitutional protection are recalled, the extravagance of the contention that atheism is unprotected comes into sharp focus. Not only belief in polygamy (*Reynolds* v. *United States, supra*) but advocacy of adultery is protected. (*Kingsley Pictures Corp.* v. *Regents*, 360 U.S. 684.) In the area of religion the "I Am" movement was held to be beyond Congressional regulation. *United States* v. *Ballard*, 322 U.S. 78. Not even harsh and offensive assaults on the religious beliefs of others

have been excluded. See, e.g. *Near* v. *Minnesota*, 283 U.S. 697; *Cantwell* v. *Connecticut*, 310 U.S. 296; *Terminello* v. *City of Chicago*, 337 U.S. 1; *Kunz* v. *New York*, 340 U.S. 290. It would be a supreme irony and a grave injustice to deny constitutional protection to the Appellant, who respects the religious views of others, and seeks merely to have the State be neutral with regard to his own. Such neutrality is guaranteed by the First Amendment; *Everson* v. *Board of Education*, 330 U.S. 1, 18. The *Everson* and *McCollum* cases dispel any possible contention that the First Amendment distinguishes between believers and non-believers. Indeed, the plaintiff in *McCollum* was herself an atheist, "as she has every right to be", as Mr. Justice Jackson noted in his concurrence. 333 U.S. 203, 232 at 234, and *Zorach* v. *Clauson* did not purport to overrule these decisions. "We follow the *McCollum* case." 343 U.S. at 315. We submit that *Zorach* confirms our view that Article 37 is unconstitutional. Most assuredly it will not bear the heavy burden which the Court below seeks to impose upon it—the view that freedom of religion extends only to those who believe in a Supreme being.

II

ELIGIBILITY FOR A STATE OFFICE CONDITIONED UPON A BELIEF IN THE EXISTENCE OF GOD CONSTITUTES A LAW RESPECTING AN ESTABLISHMENT OF RELIGION IN VIOLATION OF THE FIRST AMENDMENT, MADE APPLICABLE TO THE STATES BY THE FOURTEENTH AMENDMENT.

A. Religious Tests and Establishment of Religion

The requirement of a belief in God as a qualification for public office in Maryland strikes at the very heart of the First Amendment's prohibition against an establishment of religion. For it creates a religious test for public office—historically the hallmark of religious establishment.

In *Cantwell* v. *Connecticut*, 310 U.S. 296, 303, the Court clearly stated that the "establishment" clause is applicable to the states:

> "The First Amendment declares that Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof. The Fourteenth Amendment has rendered the legislatures of the states as incompetent as Congress to enact such laws."

Later, in *Everson* v. *Board of Education*, 330 U.S. 1, the Court reiterated this position, and expounded further:

> "The 'establishment of religion' clause of the First Amendment means at least this: *Neither a state nor the Federal government can set up a church. Neither* can pass laws which aid one religion, aid all religions, or prefer one religion over another. *Neither* can force nor influence a person to go to or remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. *Neither a state* nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa. In the words of Jefferson, the clause against establishment of religions by law was intended to erect 'a wall of separation between church and State'. *Reynolds* v. *United States*, supra at 164." Id. at 15-16. (Emphasis added)

In *McCollum* v. *Board of Education*, 333 U.S. 203, the Court was asked to overrule *Everson*, but expressly and decisively declined to do so. In the later case of *Zorach* v. *Clauson*, 343 U.S. 306, the *McCollum* case was found distinguishable, but the Court carefully declared, "We follow the McCollum case." Id at 315.

It therefore is apparent that this Court has rigorously adhered to the proposition that states are as forbidden by the Fourteenth Amendment as is the Federal government from making any law respecting an establishment of religion.

The religious clause in the First Amendment "reflected in the minds of early Americans a vivid mental picture of conditions and practices which they fervently wished to stamp out in order to preserve liberty for themselves and their posterity." *Everson* v. *Board of Education*, 330 U.S. 1, 8.[5] It is appropriate therefore, to review the place of the test oath in the history of religious establishment.

The Act of Supremacy, 1558, 1 Eliz. 1, c.1., § 19, required of all holders of office in church and state an oath accepting the Queen as supreme governor of all things ecclesiastical and temporal. This oath was extended by the act of 5 Eliz. 1, c.1., § 5 (1562) to teachers, lawyers, officers of the courts, sheriffs and members of the House of Commons. See also the Non-conformity Act, 1593, 35 Eliz. 1, c.1. By the Presentation of Benefices Act, 1605, 3 Jac. 1, c. 5, "popish recusants", convicted under one of the uniformity or supremacy acts, were denied access to the courts, id. at § 2, and "utterly disabled to exercise any public office or charge in the commonwealth." Id. at § 9.

Under Charles II, a sacramental test "according to the rites of the church of England" was imposed on all officers of municipal corporations. By The Corporations Act, 1661, 13 Car. 2, Stat. 2 c.1, §12, and by the Test Act, 1672, 25 Car.

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[5] The precise issues which divided the Court in those cases are not immediately relevant.

[6] "No provision of the Constitution is more closely tied to or given content by its generating history than the religious clause of the First Amendment. It is at once the refined product and the terse summation of that history." *Id.* at 33 (dissenting opinion.)

2, c.2, all office-holders, civil and military, were required to take the sacrament and make a declaration against the Catholic doctrine of transsubstantiation. A stricter test was imposed an all members of both houses of Parliament. Act to Disable Papists from Sitting in Either House of Parliament, 1677, 30 Car. 2, st. 2, c.1. See generally Adeney, *Non-Conformity*, 9 *Encyclopedia of Religion and Ethics* 381-93 (Hastings ed. 1928); Seaton, *The Theory of Toleration Under the Later Stuarts* (1911). Annual indemnity bills and the practice of taking the sacrament once a year gave non-Catholic dissenters *de facto* immunity from these penalties. Smith, *A Constitutional and Legal History of England* 368 (1955)[7]

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[7] Between 1791 and 1868 a series of acts provided substantially full relief to Catholics and Non-conformists alike. Maitland, *The Constitutional History of England* 519-21 (1919). Though by this remedial legislation, specific sects were no longer discriminated against, the traditional oath of office was still required of various officials, 9 Encyclopedia of the Laws of England, *Oath* at 250-52 (Benton ed. 1898), and members of Parliament, Parliamentary Oaths Act, 1866, 29 & 30 Viet., c.19, as amended by the Promissory Oaths Act, 1868, 31 & 32 Viet., c.72. Accordingly, the common law rule, *Omichund* v. *Barker*, Willes 538, 125 Eng. Rep. 1310 (Ch. 1744) (under which the test of competency to testify was whether the witness believed in a God who punishes iniquity in this world or the next) excluded doubters and atheists from office. This last disability was removed by the Oaths Act, 1888, 51 & 52 Viet., c.46, which granted to non-believers the right to affirm wherever an oath is required and to omit any words of imprecation. The seating in Parliament shortly thereafter of the famous secularist Charles Bradlaugh has been called the "final important victory" for freedom of religion in England. Address by A. L. Goodhart, in *Tolerance and the Law* 14 (1955).

To this day one of the three oaths taken by the sovereign of England upon his coronation is to preserve the establishment of the Anglican Church.

The relationship between the "test oath" and the establishment in England was summarized approvingly by Blackstone:

"In order the better to secure the established church against periods from non-conformists of all denominations, infidels, Turks, Jews, heretics, papists, and sectaries, there are, however, two bulwarks erected; called the corporation and test acts: by the former of which no person can be legally elected to any office relating to the government of any city or corporation, unless within a twelvemonth before he has received the sacrament of the Lord's supper according to the rites of the church of England; and he is also enjoined to take the oaths of allegiance and supremacy at the same time that he takes the oath of office; or, in default of either of these requisites, such election shall be void. The other, called the test act, directs all officers, civil and military, to take the oaths and make the declaration against transubstantiation in any of the king's courts at Westminster, or at the quarter sessions, within six calendar months after their admission; and also within the same time to receive the sacrament of the Lord's supper according to the usage of the church of England, in some public church, immediately after divine service and sermon, and to deliver into court a certificate thereof signed by the minister and church-warden, and also to prove the same by two credible witnesses, upon forfeiture of £500 and disability to hold the said office. And of much the same nature with these is the statute 7 Jac. I. c.2, which permits no person to be naturalized or restored in blood but such as undergo a like test: which test having been removed in 1753, in favor of the Jews, was the next session of parliament restored again with some precipitation." (*Commentaries,* Bk. IV, c. 4, p. 59)

With special reference to these remarks of Blackstone, Joseph Story subsequently acclaimed the Constitution's ban on religious tests:

". . . Let it be remembered, that at the very moment when the learned commentator was penning these cold remarks, the laws of England merely tolerated Protestant dissenters in their public worship upon certain conditions, at once irritating and degrading; that the Test and Corporation

Acts excluded them from public and corporate offices, both of trust and profit; that the learned commentator avows that the object of the Test and Corporation Acts was to exclude them from office, in common with Turks, Jews, heretics, papists and other sectaries; that to deny the Trinity, however conscientiously disbelieved, was a public offense, punishable by fine and imprisonment; and that, in the rear of all these disabilities and grievances, came the long list of acts against papists, by which they were reduced to a state of political and religious slavery, and cut off from some of the dearest privileges of mankind.

It was under a solemn conscieousness of the dangers from ecclesiastical ambition, the bigotry of spiritual pride, and the intolerance of sects, thus exemplified in our domestic as well as in foreign annals, that it was deemed advisable to exclude from the national government all power to act upon the subject." II *Commentaries on the Constitution of the United States*, § 1878-9 (1891, Bigelow, ed.)

Many of the American colonies had like restrictions on eligibility for public office, with variation from place to place depending on which sect was established. See Pfeffer, *Church, State and Freedom*, 68, 69, 75, 80. But in the Bill for Establishing Religious Freedom, Thomas Jefferson and James Madison sought to do away with this form of repression. The singular importance of this Bill as the precursor of the religious clause of the First Amendment was remarked by both the majority and minority in the *Everson* case, *supra*. 330 U.S. 1 at 12-14 (opinion of the Court) 35-39 (dissenting opinion). The Bill was particularly concerned with two forms of establishments: 1) taxation of citizens to support the established church and 2) disqualification for public office based on religious beliefs. The *Everson* case concerned the expenditure of public funds, and this Court addressed itself principally to those portions of the Bill dealing with the former objection (id at 13). We set forth here the relevant portions directed against disqualification. In pertinent part the preamble of the Bill read:

> "That our civil rights have no dependence on our religious opinions, any more than on our opinions in

physics or geometry; that therefore the proscribing of any citizen as unworthy of public confidence by laying upon him an incapacity of being called to offices of trust and emolument, unless he profess or renounce this or that religious opinion, is depriving him injuriously of those privileges and advantages to which in common with his fellow citizens he has a natural right; that it tends only to corrupt the principle of that religion it is meant to encourage by bribing with a monopoly of worldly honors and emoluments, those who will externally profess and conform to it."

The operative section of the Act provided that:

". . . no man . . . shall be enforced, restrained, molested, or burthened in his body or goods, nor shall otherwise suffer on account of his religious opinions or belief; but that all men shall be free to profess, and by argument to maintain, their opinion in matters of religion, *and that the same shall in no wise diminish, enlarge or affect their civil capacities.*" *Ibid,* (Emphasis added)

While the Bill was being pressed in Virginia (1779-86), Joseph Hawley in Massachusetts, though a member of the established Congregational church, refused to take his place in the Legislature in protest against the test oath. He wrote, "Did our Father Confessors imagine that a man who had not so much fear of God, as to restrain him from acting dishonestly and knavishly in the trust of a Senator or representative would hesitate a moment to subscribe to that declaration?". Quoted in Niles (ed.), *Principles and Acts of the Revolution,* 374.

At the Constitutional Convention, discussion of religious disqualification was in terms of the proposal that was enacted as Art. VI cl. 3, prohibiting a religious test for public office "under the United States". This proposal was presented by Charles Cotesworth Pinckney who told the convention that it was "a provision the world will expect from you in the establishment of a System founded on Republican Principles and in an age so liberal and en-

lightened as the present".[8] Although Sherman of Connecticut thought the prohibition was unnecessary since no one would seek to impose a test,[9] the proposal was adopted unanimously.[10]

The ban on religious tests won wide, although not unanimous, approval in the ratification conventions of the states. The expressions in support are further evidence of the intimate relationship between these tests and religious liberty.

Edmund Randolph, addressing the Virginia convention stated that although he had once thought that freedom of religion was endangered by the Federal Constitution, his opinion was changed by Article VI. He explained that while public officers would be required to take an oath that they would support the Constitution, yet they were not bound to support one mode of worship or to adhere to one particular sect. A man of abilities and character, of any sect whatever, could be admitted to any office or public trust under the United States. Because of the many sects that were and might be in Congress, he felt that Congress would always support religious freedom.[11]

Oliver Ellsworth, later Chief Justice of the United States, published simultaneously in the *Connecticut Courant* at Hartford and the *American Mercury* at Litchfield a series of anonymous letters on the proposed Federal Constitution, signed "A Landholder". The seventh of the series dealt with the religious test clause. He explained that its sole purpose and effect was to exclude persecution and to provide religious liberty, a right of human nature which few other people in the world shared.[12] He agreed with Randolph that a test in favor of any one denomination of

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[8] 3 Farrand, *Records of the Federal Convention of 1787*, 122.
[9] 2 *id.* 468
[10] 2 *id.* 461, 468
[11] 3 *id* 310
[12] Ford, *Essays on the Constitution of the United States*, 168

Christians would be absurd in the United States. "If it were in favor of either congregationalists, presbyterians, episcopalians, baptists, or quakers, it would incapacitate more than three-quarters of the American citizens for any public office; and thus degrade them from the rank of free men . . . " [13]

Ellsworth pointed out that if any test oath were to be imposed, the least exceptionable would be one requiring all persons appointed to office to declare, at the time of their admission, their belief in the being of a God, and in the divine authority of the Scriptures. In favor of such a test, he explained, it might be said that one who believed these great truths would not be so likely to violate his obligations to his country as one who disbelieved them. However, he rejected this argument. The making of a declaration of such a belief, he said, would be no security at all. For an unprincipled man who neither believed the word nor the being of God and was governed merely by selfish motives, would easily make a public declaration of his belief in the creed which the law prescribed, and excuse himself by calling it a mere formality.

Test oaths, he continued, would bar from public office honest men, men of principle, who would rather suffer an injury than act contrary to their consciences. It is within the authority of the people to choose their officers, he stated, and if they wished to insure that those appointed to public offices would be sincere friends of religion, they should take care to choose such persons and not rely upon "cob-web barriers as test-laws are". Connecticut, he said, had never thought it expedient to adopt a test-law and yet religion and morality was as extensive in that state as in England, where "every person who holds a public office, must either be a saint by law or a hypocrite by practice." [14]

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[13] *id.* 169-71

[14] *id.* 169-71

In Massachusetts, the Baptist Isaac Backus defended the prohibition on the ground that "nothing is more evident, both in reason and the Holy Scriptures, that that religion is ever a matter between God and the individuals." [15] Even a fellow delegate who was a minster in the established Congregational Church agreed with the ban on the ground that "God alone is the God of conscience, and, consequently, attempts to erect human tribunals for the conscience of men, are improper encroachments upon the prerogatives of God." [16]

There was considerable debate on Article VI at the North Carolina Convention. James Iredell, later a Justice of this Court, vigorously approved.

> "Yet it is notorious that dissenters qualify themselves for offices in this manner, though they never conform to the Church on any other occasion; and men of no religion at all have no scruple to make use of this qualification. It never was known that a man who had no principles of religion at all hesitated to perform any rite when it was convenient for his private interest. No test can bind such a one. I am therefore clearly of the opinion that such a discrimination would neither be effectual for its own purposes, nor, if it could, ought it by any means to be made. . . . certainly have no authority to interfere in the establishment of any religion whatsoever . . ." *But it is objected that the people of America may, perhaps, choose representatives who have no religion at all, and that pagans and Mahometans may be admitted into offices. But how is it possible to exclude any set of men, without taking away that principle of religious freedom which we ourselves so warmly contend for?*" [17] (Emphasis added)

Governor Johnston agreed with Iredell. He granted that Jews and pagans might be elected, but deemed this an insufficient objection. " . . . if persons of such description

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[15] 2 Elliot, *Debates of the Several State Conventions on the Adoption of the Federal Constitution*. 118-19.

[16] *id.* 148-149

[17] *id.* 193-198

should, notwithstanding their religion, acquire the confidence and esteem of the people of America by their good conduct and practice of virtue" it was proper that they should be permitted to serve—though he thought it was not very probable that this would happen. Johnston thought "it would have been dangerous if Congress could intermeddle with the subject of religion."[18]

One delegate, however, contended that " . . . in a political view, these gentlemen who formed this Constitution should not have given this invitation to Jews and heathens."[19]

But another responded "/. . It is feared that persons of bad principles, deists, atheists, etc. may come into this country; and there is nothing to restrain them from being eligible to offices . . . But in this case as there is not a religious test required, it leaves religion on the solid foundation of its own inherent validity, without any connection with temporal authority; and no kind of oppression can take place." [20]

The ban on religious tests aroused opposition among some religionists. When the issue was raised in the Maryland legislature, Luther Martin related:

"The part of the system which provides that no religious test shall ever be required as a qualification to any office or public trust under the United States was adopted by a great majority of the Convention and without much debate: however, there were some members so unfashionable as to think that a belief in the existence of a Deity, and of a state of future rewards and punishments would be some security for the good conduct of our rulers, and that, in a Christian Country, it would be at least decent to hold out some distinction between the professors of Christianity and downright infidelity or paganism".[21]

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[18] 4 *id.* 198-9
[19] 4 *id.* 199
[20] 4 *id.* 200.

The late Canon Stokes, in *Church and State in the United States* (Vol. I, p. 602-603), summarizes the arguments presented in the States legislatures and ratifying conventions for and against the ban on religious tests for office in Article VI.

"The first group felt that history showed the grave danger of religious tests leading to persecution; that the Federal government should have no right to interfere with the states in this matter; that Christ never called for support for His religion by worldly authority; that the people of this country might be relied upon not to entrust government to irreligious people; that the only way to produce national political unity was to leave religion "free and unshackled"; that permitting a variety of sects encouraged religious freedom and prevented any State Church; that to require a religious test would exclude some well-qualified citizens from holding office; that likewise such a test would not prevent some unscrupulous men entering public life; that St. Peter's statement that "God is no respecter of persons" is applicable in this case; that religion is exclusively a matter between God and the individual and not subject in any way to State approval; that the high state of intelligence and liberty in the country made further guarantees of religious liberty unnecessary, especially as the Constitution gave no power to Congress to intervene in religious matters.

"The second group was represented by those who feared that they might be deprived under the Constitution of the privilege of worshipping God according to their consciences; that the treaty-making power of the Senate might result in a treaty or treaties making the Roman Catholic religion compulsory; that the pope might be elected president; that unbelievers or Mohammedans might be officeholding; that "Popish priests" might not be excluded from elected to office; that the oath of office might be sworn merely by Jupiter or by Minerva; that as the Constitution did not guarantee that officeholders be men believing in God or in Christ, it was dangerous."

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[21] 3 Farrand, *Records of the Federal Convention of 1787*, 227.

This account of the background that gave rise to the ban in the Federal Constitution on religious tests for office establishes conclusively, first, that its scope includes tests based upon a belief in the existence of God (so that Roy Torcaso, the Appellant herein, is qualified to serve as President of the United States although the court below held him unqualified to serve as a notary public in Montgomery County), and secondly, that the ban was imposed in order to assure the separation of church and state and to abolish all vestiges of an establishment of religion.

Since the prohibition against the establishment of religion is now applicable to the States by virtue of the Fourteenth Amendment, we submit that so too is the prohibition of religious tests for public office, which is an unseverable element in the prohibition against establishment of religion.

B. Preference of Some Religions over Others

The requirement of a belief in the existence of God prefers some religions over others, specifically theistic religions over those which are non-theistic.

It is frequently assumed that all religions are founded upon a belief in the existence of a personal God or at least of some "God" no matter how that term is defined. This is not so. So great a religion as the Buddhist religion with over 150 million adherents throughout the world including the United States (*World Almanac*, 1961, p. 712) is not founded upon a belief in the existence of God. Rhys-Davis, "Buddhism," in *Religious Systems of the World*, p. 142; Spielberg, *Living Religions of the World*, p. 247; Alabaster, *The Wheel of the Law*, p. XXXVII.

In *Washington Ethical Culture Society* v. *District of Columbia*, 249 F. 2d 127, the Court of Appeals for the District of Columbia held unanimously that the Ethical Culture Society is a religious society and that Ethical Culture is a religion although it does not require "a belief and teaching

of a Supreme Being who controls the universe." See also, *Fellowship of Humanity* v. *Alameda County*, 153 C.A. 2nd 673, 315 P. 2nd 394.

It is clear, therefore, that in fact and in law belief in the existence of God is not an indispensable element of religion and that the validity of a religion does not in law depend upon its commitment to a Supreme Being. It follows from this that a law favoring theistic over non-theistic religions constitutes preferential treatment forbidden by the prohibition of laws respecting an establishment of religion. Such a law is no less barred by the First Amendment than one requiring a belief in Christianity, or in Trinitarian Christianity, or in Protestant Christianity.

C. Neutrality Between Belief and Non-Belief

The obligations of the First Amendment are not satisfied by according governmental favors to all religions equally. The limitations of the Amendment are transgressed when the States singles out religious groups for preferential treatment over comparable non-religious groups. *Everson* case, *supra*.

Hence, even if religion were narrowly defined to exclude non-theistic belief, a law according special privileges to theism would violate the mandate of neutrality. In the *Washington Ethical Culture* case, *supra*, the Court of Appeals referred to the potential invalidity of such preferential treatment. It construed the underlying statute so as to avoid the constitutional issue but noted that exclusion of non-theism from benefits and privileges accorded by the State to theism would raise serious constitutional problems. In the present case, the constitutional issue is raised since the Maryland Court of Appeals has held that the action of the Clerk of the Circuit Court for Montgomery County acted within his authority under the Constitution of the State of Maryland.

III

THE MARYLAND TEST OATH IS A RELIGIOUS TEST PROHIBITED BY ARTICLE VI, UNITED STATES CONSTITUTION.

Article VI, United States Constitution presents another prohibition against the requirement that one seeking a public office must, as a qualification for that office, declare his belief in the existence of a Supreme Being. The third clause of Article VI of the United States Constitution reads as follows:

"The Senators and Representatives before mentioned, and the members of the several State Legislatures, and all executive and judicial officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution; but *no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.*" (Emphasis supplied.)

This language is absolute and unqualified in its terms. It flatly prohibits *any* religious test as a qualification for any public office, necessarily including a statement of belief in the existence of God. It is clear that the office of Notary Public in the State of Maryland falls within this prohibition, as it is an "Office or public Trust" and is so recognized by the Court below. (R. 13). That Court, however, found the third clause of Article VI is "plainly inapplicable". (R. 17) We submit that this conclusion erroneously limits the scope of the provision.

In view of the sweeping language of the abolition of religious tests in Article VI, the sole question is whether language of the above-quoted clause, particularly "under the United States" includes state, as well as federal, offices. The issue is admittedly not free from doubt, and there is no case law in point. The context of the clause strongly suggests that state officers were intended to fall within the scope of the prohibition. All state officers were bound to take an oath to defend the United States Constitution. Thus they were to serve literally "under the United States".

The very purpose of Article VI as a whole was to declare that state power was limited by the Federal Constitution and the Laws enacted pursuant thereto, which were to be the Law of the Land. Article VI, after all, contains the Supremacy Clause. *Cf. Cooper* v. *Aaron*, 358 U.S. 1. The entire scope and intent of the Supremacy Clause was to answer such claims as that advanced by the Court below that "Obviously, Congress could not prescribe qualifications for state office, at least not so long as we retain a Federal form of Government". (R. 17) Indeed, the sentence immediately preceding the prohibition of religious tests prescribed precisely such a qualification for state office—an oath or affirmation to support the Constitution. Moreover, it is obvious that the power of *Congress* to so act is in no way relevant here and that the *Constitution* could and did impose countless limitations, expressed and implied, upon the states. Article I, Section 10, alone, places over a dozen such limitations upon the several states, and further restrictions are found in Articles III and IV.

It appears strange, indeed, to impute to the authors of the Constitution an intent to prescribe an oath *or* affirmation for federal and state officers alike, but to forbid a religious test only for federal officers. Moreover, if they had intended that only federal officers would be relieved of religious tests, this clause presumably would have been placed in one of the Articles dealing with the various offices created by the Constitution, or as one of the limitations on Congressional legislative power in Article I, rather than in Article VI, dealing with the relationship between the federal government and the states.[22]

While it is true that Appellant's position in this regard has been rejected by some scholars in this field,[23] it must

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[22] Stokes, *Church and State in the United States*, N.Y., Harper and Brothers, 1950, Vol. I, Sections 523-24, 576, 611-12; Zollman, *Religious Liberty in the American Law*, 17 Mich. L. Rev. 355-56, (1919). See also Story, *op. cit. 25 supra*.

be noted that they, like this Court, were faced with a question on which there appears to be no direct expression of the drafters' intent and therefore they could but speculate. In addition, there is no indication that either considered the very placement of the prohibition, as discussed above, as an implicit expression of that intent. Indeed, their conclusion is entirely unsupported by analysis. Even if this Court rejects the view that the framers of the Constitution intended to include state offices with the prohibition of Article VI, it is submitted that the subsequent passage of the First and Fourteenth Amendments and the decisions of this Court interpreting them demonstrate beyond peradventure that state offices are included today. And here, Canon Stokes supports our position:

"There are two fundamentally important provisions which deal directly with religious rights, namely, the forbidding of religious tests as qualifications for public office in the original Constitution, and the guarantee of religious free-

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[23] The Convention proceedings shed little light on this question. As noted earlier in the text, the prohibition against religious tests was adopted with only minor opposition—and that based on the view that it was unnecessary.

Pinckney simultaneously introduced the amendment which authorized the pledge to support the Constitution, which state officials also had to take, to be by affirmation. 2 Farrand *op cit, supra.* Moreover, the religious test provision was throughout the Convention dealt with as part of Article VI, rather than with the Articles which dealt exclusively with federal officers.

The post-Convention history is likewise unconclusive. In a letter to Randolph, Madison is surprisingly lukewarm about the ban on religious tests and tries to dismiss it as "insignificant". In this letter he states expressly that the provision applies solely to federal offices 3 *id* at p. 297. But Randolph, himself, took a much stronger view and one of his remarks may mean that the prohibition was to be universal. 3 *id* at p. 310.

dom in the Bill of Rights, which followed two years later. The provisions of the later Fourteenth Amendment, as ratified in 1868, indirectly greatly expand the scope and field of operation of the constitutional guarantees." [24]

Later in his treatise, he noted that, "as a matter of fact it (the original Constitution) was and is important in preventing religious tests for Federal office—a provision later extended to the states." Id. at Section 527. Further:

". . . little by little these guarantees (under Article VI and the Bill of Rights), originally intended to cover only Federal cases, (were) extended to include the whole nation." Id. at Section 611.

Therefore, the intention of the drafters may have been a narrow one—to prohibit only the most flagrant form of interference with religious freedom, namely, the test oath. Later, with passage of the First Amendment, they gave to freedom of religion its present, virtually all-encompassing protection. It defies common sense as well as constitutional doctrine to contend that, although the protections to religious freedom embodied in the First Amendment were later extended to the states by the Fourteenth, that latter Amendment did not equally expand the protection to religious liberty considered by the framers as so fundamental that it warranted inclusion in the original Constitution, namely, a prohibition of the test oath. Thus, even under this alternative view, that the protection of religious freedom was expanded in broadening stages, the Article VI ban against religious tests for public office, considered so odious by the framers, is now clearly included in the guarantee of freedom of religion contained in the contemporaneous First Amendment and extended to the states by the Fourteenth.

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[24] Stokes, *Church and State in the United States*, N.Y., Harper and Brothers, 1950, Vol. I, Section 522.

IV

DISQUALIFICATION OF AN OTHERWISE QUALIFIED APPLICANT FOR STATE OFFICE SOLELY FOR REFUSAL TO DECLARE A BELIEF IN THE EXISTENCE OF GOD DENIES HIM DUE PROCESS OF LAW AND EQUAL PROTECTION OF THE LAWS IN VIOLATION OF THE FOURTEENTH AMENDMENT.

A. "Right" or "Privilege"

The Circuit Court for Montgomery County emphasized that Appellant ". . . can continue his religious position without any interference from Maryland, either as to his present employment or his citizenship, as neither is being interfered with." (R. 10.) However, it denied Appellant relief, on the asserted ground that appointment to the office of Notary Public is a "privilege". (R. 9.)

The Maryland Court of Appeals likewise held that the Appellant is ". . . not compelled to believe or disbelieve . . ." (R. 17) and denied relief on similar grounds. Although it did not employ the term "privilege", it expressed the same thought when it stated that Appellant ". . . is not compelled to hold office." (R. 17.)

The courts below imply that the qualifications which may be imposed for a state office depend upon whether it is labeled a "Right" or "Privilege". Such is not the case. Equal protection of the laws bars a state from granting privileges to some while it withholds them from others, unless a constitutionally reasonable and nondiscriminatory distinction can be made between those favored and those not favored.

The claim that public employment or office is a privilege within the uncontrolled power of the state to grant or withhold was asserted in *Wieman* v. *Updegraff*, 344 U.S. 183, and rejected by a unanimous Court. In its opinion this Court stated:

> ". . . To draw . . . the facile generalization that there is no constitutionally protected right to public employ-

ment is to obscure the issue. For, in *United Public Workers,* though we held that the Federal Government through the Hatch Act, 18 U.S.C.A. § § 118j, 118l, could properly bar its employees from certain types of political activity thought inimical to the interests of the Civil Service, we cast this holding into perspective by emphasizing that Congress could not 'enact a regulation providing that no Republican, Jew or Negro shall be appointed to federal office, or that no federal employee shall attend Mass, or take any active part in missionary work. . . . We need not pause to consider whether an abstract right to public employment exists. It is sufficient to say that constitutional protection does extend to the public servant whose exclusion pursuant to statute is patently arbitrary or discriminatory.'" Id. at 191.

In *Speiser* v. *Randell,* 357 U.S. 513, 518, concerning denial of a tax exemption, concededly a privilege, the Court held:

"To deny an exemption to claimants who engage in certain forms of speech is in effect to penalize them for such speech. Its deterrent effect is the same as if the State were to fine them for this speech. The appellees are plainly mistaken in their argument that, because a tax exemption is a 'privilege' or 'bounty', its denial may not infringe speech. This contention did not prevail before the California courts, which recognized that conditions imposed upon the granting of privileges or gratuities must be 'reasonable'."

Thus, in the granting or withholding of benefits, the label does not determine the state's power to impose conditions and qualifications. Whether the office be classified as one of "right" or "privilege", the qualifications must be reasonable, nondiscriminatory and within the Constitutional competence of the State.

B. The Reasonableness of the Discrimination

"In the absence of any direct authority on the point, we find it difficult to believe that the Supreme Court will hold that a declaration of belief in the existence of God, required by Article 37 of our Declaration of Rights as a qualification for State office, is discriminatory and

invalid." *Torcaso* v. *Watkins*, Maryland Court of Appeals Decision (R. 18).

The Court below asserts that the "... Fourteenth Amendment does not prevent the states from establishing qualifications for office, at least where the qualifications are not based on such an unreasonable and improper classification as to be discriminatory." (R. 17). Armed with that premise, the Court below attempts to predict this Court's decision in the instant case.

We contend, however, that the Maryland Court of Appeals ignored the more serious and controlling premise; that the qualification in question is far from reasonable or proper, and is highly discriminatory. The furtherance of a religious purpose is not within the Constitutional competence of a state. Jefferson's Virginia Statute points out that religion is corrupted, not aided, "... by bribing with a monopoly of worldly honors and emoluments those who will externally profess and conform to it." Page 25-26 *Supra*.

We have established above that the First Amendment guarantees freedom to disbelieve as completely as it does freedom to believe, and consequently "encompasses the ungodly". By their affirmance of Appellant's right to disbelieve without interference from the State of Maryland, both courts below recognized the proper concept of freedom of choice between religion and nonreligion. It is difficult to comprehend in what manner it can be reasonable, nonarbitrary, or nondiscriminatory to bar an otherwise qualified individual from public office merely because he has exercised a Constitutionally guaranteed choice between religious belief or nonbelief, which choice is apparently recognized by the very courts below which upheld the "test oath" requirement.

A state's duty is to remain completely neutral with respect to all matters of religion. Were a case brought before the Court below to test a state provision against Methodists, otherwise qualified, from acting as clerks of the courts, or

providing that no Jew, otherwise qualified, could be a member of the Maryland Legislature (or any other incapacitation for any position of trust or profit based on religious affiliation or lack of same) it is felt that such "test oath" legislation would be stricken as highly discriminatory, as well it should. That which would render this hypothetical legislation arbitrary and unreasonable, the freedom of religion concept of the First and Fourteenth Amendments, similarly bans the operation of the present Article 37. The same constitutional protections which allow freedom to embrace the Methodist Religion or follow the Jewish faith, allow Appellant to follow nontheistic beliefs. To disqualify Appellant from public office in a state, based solely on his lack of theistic religion, is to sanction disqualification from state office of followers of any specific theistic religion. To state that Appellant does not believe in a "God", whereas followers of theistic religions do, is not sufficient, for there is no meaningful guarantee under the First Amendment of freedom of exercising religion if it be only a theistic religion.

In *West Virginia Board of Education* v. *Barnette, supra,* Mr. Justice Jackson stated that only a grave, clear and present danger could warrant the state forcing an individual to utter words which violate his religious conscience.[25] That case is clear authority for the proposition that a state may not impose upon an individual the obligation to profess any religious view. In the instant case, as in that, the State asserts power to condition an important benefit "on making a prescribed sign and profession". 319 U.S. at 630. Here, however, the particular form of interference with Appellant's religious freedom is doubly offen-

[25] As this Court said in *Speiser* v. *Randall, supra* "only considerations of the greatest urgency can justify restrictions on speech . . ." 357 U.S. at 521. It goes without saying that a test at least equally as stringent is to be applied where the attempted restriction is on religious belief.

sive, as he is required to swear his belief in the existence of a God regardless of whether he holds such a belief. To sustain this requirement, this Court, as in the *Barnette* case, will be "required to say that a Bill of Rights which guards the individual's right to speak his own mind, left it open to public authorities to compel him to utter what is not in his mind". Id. at 633-34. "The test oath is abhorrent to our traditions, *Girouard* v. *United States*, 328 U.S. 61, 69.

The oath sought to be imposed upon Appellant thus infringes upon both the private area of his beliefs in general and his religious scruples in particular. As stated by Mr. Chief Justice Hughes, dissenting from the holding of validity of a Congressionally-imposed naturalization oath for aliens:

> "To conclude that the general oath of office is to be interpreted as disregarding the religious scruples of these citizens and as disqualifying them for office because they could not take the oath with such an interpretation would, I believe, be generally regarded as contrary not only to the specific intent of Congress but as repugnant to the fundamental principles of representative government." *United States* v. *Macintosh*, 283 U.S. 605, 632.

Mr. Justice Douglas, in his concurring opinion in *Speiser* v. *Randall, supra,* faced squarely the question of invasion of one's beliefs in connection with the holding of public office:

> "Today what one thinks or believes, what one utters and says have the full protection of the First Amendment. It is only his actions that government may examine and penalize. When we allow government to probe his beliefs and withhold from him some of the privileges of citizenship because of what he thinks, we do indeed "invert the order of things", to use Hamilton's phrase. All public officials—state and federal—must take an oath to support the Constitution by the express command of Article VI of the Constitution. . . . But otherwise the domains of conscience and belief have been set aside and protected from government

intrusion. . . . What a man thinks is of no concern to government." 357 U.S. at 535-36.

Qualification for office based on belief in a theistic or nontheistic religion cannot be deemed reasonable, proper or nondiscriminatory.

C. Position of Notary Public

The Maryland Court of Appeals appears to attach great importance to the fact that the position which the Appellant seeks is that of Notary Public. "It would appear to be somewhat paradoxical," the Court said, "if a Notary Public, who is given the power to administer oaths . . . might qualify for the office even if he disavowed a belief in God . . ." (R. 19).

But a Notary Public is not the only person authorized to administer oaths. Judges in all courts, commissioners, court clerks, mayors, members of legislative committees, and a host of other public officials throughout the United States are authorized by law to administer oaths. If a religious test oath may reasonably be imposed as requirement for the office of Notary Public, there are not many public offices for which it might not be imposed.

However, the short answer to the contention that the State's interest in preventing perjury justifies imposition of a religious test for public officers authorized to administer oaths is to be found in the fact that neither the United States Government nor at least 46 of the States [28] impose such a test. Officials of these governments administer millions of oaths yearly; yet there is not the slightest evidence in the record or elsewhere to indicate that perjury is more widespread among these governments than in the four states which do impose such a test oath.

The Court below deemed Article 36, Maryland Declara-

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[28] Besides Maryland, the Constitutions of Arkansas (Art. 19, sec. 1), Pennsylvania (Art. 1, sec. 4) and Tennessee (Art. IX, sec. 2) presently require acknowledgment of the "being of God" in order to hold public office.

tion of Rights of significant importance to a determination of the issues herein. Article 36 provides as follows:

"That as it is the duty of every man to worship God in such manner as he thinks most acceptable to Him, all persons are equally entitled to protection in their religious liberty; wherefore, no person ought, by any law to be molested in his person or estate, on account of his religious persuasion or profession, or for his religious practice, unless, under the color of his religion, he shall disturb the good order, peace or safety of the State, or shall infringe the laws of morality, or injure others in their natural, civil or religious rights; nor ought any person to be compelled to frequent, or maintain, or contribute, unless on contract, to maintain any place of worship or any ministry; nor shall any person, otherwise competent, be deemed incompetent as a witness, or juror, on account of his religious belief; provided, he believes in the existence of God, and that under His dispensation such person will be held morally accountable for his acts, and be rewarded or punished therefor in this world or the world to come."

Referring to the just-quoted Article, the Court below advises that "It might well be contended that a person convicted upon unsworn testimony, or the testimony of an atheist, would be deprived of due process, or trial according to the 'law of the land'. . . . To the members of the Convention, as to the voters who adopted our Constitution, belief in God was equated with a belief in moral accountability and the sanctity of an oath. We may assume that there may be permissable differences in the individual's conception of God. But it seems clear that under our Constitution disbelief in a Supreme Being, and the denial of any moral accountability for conduct, not only renders a person incompetent to hold public office, but to give testimony, or serve as a juror." (R 18-19). But the rule by which Maryland seeks to justify its discrimination is itself unconstitutional as we now show.

"The true purpose of the oath is not to exclude any competent witness, but merely to add a stimulus to truthfulness wherever such stimulus is feasible. Until the 1800s,

however, this advanced notion of its purpose had not been reached. The requirement was inexorable; with the result that three classes of persons were absolutely excluded from testifying, Namely adults having an atheistical belief, infants lacking in theological belief and adults having the requisite belief but forbidden by conscience to take an oath. It came gradually to be perceived that the use of the oath, not to increase testimonial efficiency, but to exclude qualified witnesses was not only an abuse of true principle, but also a practical injustice to suitors who needed such testimony. This injustice is clearly enough seen today; but its perception was naturally slow in coming, so long as in the community at large the profession of belief in deism or atheism was associated closely with the notion of moral defects. . . . Today, practically everywhere, the injustice is remedied. Arguments are no longer needed to prove the impropriety of the old inexorable rule. It is conceded that the oath should be dispensed with for appropriate classes of witnesses. . . . What is to be noted (but is sometimes forgotten) is that the demand for the dispensation of the oath for witnesses for whom it is inappropriate differs entirely from the proposal to abolish the oath for persons theologically capable of taking it. One is a question for the past; the other is a question for the future." *VI Wigmore, Evidence,* Section 1827 (3d Ed. 1940).

Wigmore, in tracing the history of the oath, noted that the recognition "that the inexorable requirement of an oath worked in injustice, and that theological belief should not obstruct the admission of competent witnesses" began as early as the 1700's. Id. at Section 1815. He noted further that the nature of the belief which was to afford the stimulus to truthful testimony is that in a superhuman moral retribution which will follow false swearing. It is thus a belief in a system of future rewards and punishments. Id. at Section 1817. But, would not such a belief exclude from public office and the witness stand members of those religions whose precepts do not include belief in a system of rewards and punishments? It is into this maze of constitutional questions we are led by the retention of the inflexible common law rule, devised centuries before our Bill of Rights. Thus,

". . . the question is not whether persons not having a certain theological belief shall be excluded as witnesses; nor whether it shall be made optional for persons of various sorts; but whether persons having the sufficient belief shall be required to take it. *Eliminating all argument as to the injustice of exclusion, by assuming that persons of atheistic belief, and persons having scruples of conscience, and infants, are allowed to dispense with it. . . .*" Id. at Section 1827. Emphasis added.

It certainly cannot be said that atheists as a group are not worthy of belief. Appellant has demonstrated his veracity by his refusal to take the oath acknowledging a belief in God. If he had done so, he would have received his commission automatically and would not have risked losing the office or been required to bear the expense of the ensuing litigation. The example of the right of Quakers to affirm, rather than swear, is very much in point here. That right was won at the cost of persecution, ridicule and humiliation. Gradually, however, Englishmen and Americans alike recognized that even though Quakers would not swear, they could be counted on to tell the truth. Their very willingness to endure the persecution for the right to affirm was evidence that they did not take affirmations lightly.

The same rationale applies to atheists. As Thomas Raeburn White stated in a law review article early in this century:

"It requires more than usual frankness and regard for the truth to avow such sentiments (i.e., of nonbelief) upon such an occasion. If he does avow them, the consequences are severe. He subjects himself to certain criticism, if not to infamy, as was once thought; he makes it impossible for himself to be a witness in a case in which perhaps he desires to testify, for possibly he be an expert who depends upon his right to testify for a living. The presumption, therefore, of mendacity is not only completely destroyed, but it is supplanted by another, the strongest kind of presumption, that the witness will adhere strictly to the truth. He may indeed be lacking in religious sanction, but he has shown that the other inducements to truth telling are present in him to an extraordinary degree. How palpably inconsistent

to exclude such a man and to admit an abandoned criminal who declares whether true or false that he believes in God." *Oaths in Judicial Proceedings and Their Effect Upon the Competency of Witnesses,* 42 N.S. Am. Law Reg. 373, 409 (1903).[27]

In *Gillars* v. *United States,* 182 F. 2d 962, 970 (D.C. Cir.), Circuit Judge Fahy held that "in the light of reason and experience" (which is the test of competency under Rule 26 of the Federal Rules of Criminal Procedure) a witness should be permitted to affirm, rather than swear. *Gillars* was a treason trial. Surely if a witness is competent to testify under affirmation in a treason case, he should be competent to attest the authenticity of a document in the same manner.

The disqualification of Appellant from holding public office and from being a witness serves to impose upon him the stigma of second-class citizenship. For example, aliens were not permitted to testify under the common law. II Wigmore, *Evidence,* Section 516 (3d Ed. 1940). Moreover, it is unthinkable as a matter of due process that a person on trial for his life or liberty should be denied the testimony of a key witness solely because the latter may be an atheist. And what if the atheist, himself, is on trial? May he be deprived of the opportunity of testifying on his own behalf?

In *Hirabayashi* v. *United States,* 320 U.S. 81, this Court said (at p. 100): "Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality." The same is true, we submit, in respect to distinctions based upon religious belief. Only upon the most cogent evidence of the necessity for a distinction on religious grounds would governmental discrimination be constitutionally justifiable. What we have in the present

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[27] See also Bentham, *Swear not at all,* in V *Jeremy Bentham's Works* (Bowring Ed. 1843), p. 187.

case is no more than mere speculation, contradicted by the century and three quarters experience of the Federal Government and the many years of experience of forty-six state governments. Such speculation does not justify disregard of the Constitutional mandate of equality.

The fact that Maryland is all but alone in retaining this relic of the common law suggests that it does not comport with the requirements of due process. For, unlike the "contrariety of views of the States" noted by this Court in *Wolf* v. *Colorado*, 338 U.S. 25, 29, there is virtual unanimity of state rejection of the religious oath in judicial proceedings. See, *Rochin* v. *California*, 342 U.S. 165, 169-71, and the concurring opinion of Mr. Justice Frankfurter in *Joint Anti-Fascist Committee* v. *McGrath*, 341 U.S. 123, 162-63.

For all of these reasons, a qualification for public office based on belief in a theistic or nontheistic religion cannot be deemed reasonable, proper or nondiscriminatory, nor does embracing nontheistic religious belief create any grave, clear or present danger. The true danger is in sanctioning a compulsory rite which violates the conscience of the individual.

CONCLUSION

Freedom of belief "is the matrix, the indispensable condition of nearly every other form of freedom. With rare aberrations a pervasive recognition of that truth can be traced in our history, political and legal. So it has come about that the domain of liberty, withdrawn by the Fourteenth Amendment from the encroachment of the states, has been enlarged by latter-day judgments to include liberty of the mind as well as liberty of action." Palko v. Connecticut, 302 U.S. 319, 327. The decision of the Court below strikes directly at liberty of the mind. It should be reversed, and the cause remanded with directions to overrule the demurrer.

Respectfully submitted,

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IN THE

Supreme Court of the United States

October Term, 1960

No. 373

ROY R. TORCASO, *Appellant*,

v.

CLAYTON K. WATKINS, *Clerk of the Circuit Court for Montgomery County, Maryland.*

On Appeal from the Court of Appeals of the State of Maryland

BRIEF FOR THE AMERICAN ETHICAL UNION AS *AMICUS CURIAE*

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IN THE

Supreme Court of the United States

October Term, 1960

No. 373

ROY R. TORCASO, *Appellant,*

v.

CLAYTON K. WATKINS, *Clerk of the Circuit Court for Montgomery County, Maryland.*

On Appeal from the Court of Appeals of the State of Maryland

BRIEF FOR THE AMERICAN ETHICAL UNION AS *AMICUS CURIAE*

The Interest of the American Ethical Union

The American Ethical Union is a federation of all the Ethical Culture Societies and Groups in the United States, which, collectively, constitute a liberal religious fellowship known as the "Ethical Movement" or the "Ethical Culture Movement". The first Ethical Culture Society was founded in New York City in 1876 by Dr. Felix Adler. The Movement has had a marked growth in recent years. Since 1949 membership has doubled and the number of Societies and Groups has increased four-fold. Today, there

are twenty-eight Societies and Groups in eleven states (including the State of Maryland) and the District of Columbia.

The American Ethical Union is a member of the International Humanist and Ethical Union, which has held two International Congresses and which will hold a third, in Oslo, in 1962. The member organizations include groups from the United States, Great Britain, Belgium, Holland, Austria, India, Norway, France, Germany, Japan and South Africa.

The Ethical Movement has been widely recognized as a religion. It is listed as a religion in the Census of Religious Bodies published by the Federal Government,[1] and in various religious publications[2] and general reference works.[3] Federal tax exemption rulings have been issued to The American Ethical Union and to the various Ethical Societies, including, it might be noted, the Baltimore Ethical Society situated within the State of Maryland. The District of Columbia Society has been held to be "a religious corporation or society," the building of which "is one primarily and regularly used by its congregation for public religious worship," within the meaning of the District of Columbia Code provision exempting property of "religious societies" from certain local taxes. *Washington Ethical Society* v. *District of Columbia*, 249 F.2d. 127 (D. C. Cir. 1957). All the Ethical Societies and Groups con-

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1 U. S. Bureau of the Census, Dep't. of Commerce, *Religious Bodies, 1936* (1941).

2 *Yearbook of American Churches* (Landis ed. 1958); *A Guide to the Religions of America* (Rosten ed. 1955); Burtt, *Types of Religious Philosophy*. (1939); Ferm, ed. *Religion in the Twentieth Century* (1948); 5 *Encyclopedia of Religion and Ethics* (Hastings ed. 1928).

3 Hutchinson, *Twentieth Century Encyclopedia* (rev. ed. 1952); 21 *Dictionary of American Biography* (Starr ed. 1944); 8 *Encyclopedia Brittanica* (14th ed. 1932); 10 *Encyclopedia Americana* (1947 ed.).

duct services and religious schools for children which meet regularly on Sunday mornings. The Leaders of the Ethical Societies, some of them drawn from the ordained ministry of other religious groups, are required to have advanced degrees, post-graduate study in religion and philosophy and to take an intensive course of training before appointment and admission to the Fraternity of Leaders of the American Ethical Union. The Leaders provide the usual pastoral services customarily performed by ministers of religion, such as officiating at marriages, funerals and naming ceremonies, and counselling members of the Societies on ethical and moral problems.

The Ethical Movement has no fixed creed or dogma, and requires no particular theological beliefs of its members. It

> "holds that, although the universe which we all share, speaks to us in different accents or tongues, no one can be sure, or prove to others, which one is true. The Ethical Movement therefore, is uncommitted on theological and metaphysical questions. Whether one does or does not believe in God, prayer or immortality, is one's own affair. Membership in an Ethical Society is not conditioned on acceptance or rejection of any one answer to such question. In the Ethical Movement the good life and the rights and duties of human beings are looked upon as stemming from man's relations to man in the family of mankind." [*Do You Know the Ethical Movement?*, pamphlet published by the American Ethical Union, 2 West 64th Street, New York 23, N. Y. p. 3]

The issue in this case—whether a State may require, as a condition of holding public office, that a person declare his belief in the existence of God—is a matter of serious concern to the American Ethical Union. We believe that the decision below, which upholds the denial to appellant of a

Commission as a Notary Public by the State of Maryland solely because of his refusal to declare such belief, poses a threat to all non-theistic and liberal religions in this country, that is, to religious groups, such as the Ethical Movement, which do not require, as an essential element of their "faith," an affirmative belief in the existence of a Supreme Being. The freedom of religion protected against State interference by the First and Fourteenth Amendments includes the right to hold and practice any belief that an individual considers his religion. See *United States* v. *Ballard*, 322 U. S. 78, 86-88 (1944); *Follett* v. *McCormick*, 321 U. S. 573, 577 (1944). We believe that this right is seriously weakened if a State can ban from public office those whose religious beliefs are non-theistic.

ARGUMENT

Non-Theistic Belief Constitutes a Religion which is Entitled to the Protection of the First and Fourteenth Amendments.

Introduction

The Fourteenth Amendment makes applicable to the States the prohibition in the First Amendment that the state "shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." *Everson* v. *Board of Education*, 330 U. S. 1, 8 (1947); *McCollum* v. *Board of Education*, 333 U. S. 203, 210 (1948). Appellant contends that the provision in Article 37 of the Declaration of Rights in the Maryland Constitution, which, as interpreted by the Maryland Court of Appeals, requires an applicant for a Commission as a Notary Public to declare his belief in the existence of God (R. 14-17), is unconstitutional because it is both a law respecting an establishment of religion, and one prohibiting the free exercise thereof.

A critical inquiry in determining those questions is whether a religious group is outside the Constitutional protection merely because it does not affirmatively profess a belief in the existence of a Supreme Being. The decision below, by denying the right to hold public office to those who refuse to declare their belief in the existence of God, treats such individuals less favorably than those who hold and are willing to declare such belief. If, as we believe clearly to be the case, the so-called "non-theistic" religious groups are just as much a "religion" in the constitutional sense as the traditional faiths which proclaim the existence of a Supreme Being (see *infra*, pp. 6-10, 12-14), then the decision below plainly prefers certain religions (the theistic) over others (the non-theistic). It is settled, however, that "[n]either a state nor the Federal Government can * * * prefer one religion over another." *Everson* v. *Board of Education*, 330 U. S. 1, 15 (1947); *McCollum* v. *Board of Education*, 333 U. S. 203, 210 (1948).

Since the legal arguments will be fully presented by appellant, we shall not repeat them here. We think it may be helpful to the Court, however, to present certain non-legal material which bears upon the issue. Accordingly, we shall describe the religious beliefs of the non-theistic movement in the United States, trace its history and development, and show that today the movement is recognized and treated as just as truly a religion as the traditional faiths which profess a belief in a Supreme Being. We shall also urge that the religious freedom of the traditional theistic faiths cannot be maintained unless the religious freedom of the non-theists and other dissenters is also kept inviolate.

A. The Beliefs of the Non-Theistic Religions

Non-theism is a view which neither categorically denies, nor dogmatically affirms, the existence of a Supreme Being. Recognizing the limitations and the fallibility of the human intellect and the proper restriction of its use to matters of experience, non-theism argues that the existence or non-existence of God is not susceptible of proof and should, therefore, be left entirely within the realm of private belief. Organized non-theistic religious groups, such as the Ethical Culture Societies, include members whose personal faith includes a Supreme Being, and those whose personal faith does not.

As long ago as 1886, Felix Adler, founder of the Ethical Movement, pointed out:

> "Religion is not identical with theology. It is indeed often maintained that the belief in a personal God should be regarded as the foundation and criterion of religion * * *."
>
> * * *

But, he added,

> "It is the moral element contained in it that alone gives value and dignity to any religion, * * *. The appeal to conscience has ever been the lever that raised mankind to a higher plane of religion."[4]

More than two decades ago John Dewey wrote *A Common Faith*, devoted to separating "the religious phase of experience * * * from the supernatural and the things that have grown up about it." [Dewey, *A Common Faith* (1934) p. 2.] He wrote that religious qualities "are not bound up with any single item of intellectual assent, not even that of the existence of the God of theism" (*Ibid* p. 32). To him "religious" signified an attitude, "independent of the supernatural" (*Ibid* p. 66).

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4 Adler, *Creed and Deed* (1886), pp. 37, 163-164.

In his book, *Ethics as a Religion* (1951), Dr. David Saville Muzzey, a Leader in the Ethical Culture Movement, points out (pp. 86-87) that "Everybody except the avowed atheists (and they are comparatively few) believes in some kind of God", and that "The proper question to ask, therefore, is not the futile one, Do you believe in God? but rather, What *kind* of a God do you believe in?" In an attempt to answer that question Dr. Muzzey continues (p. 95):

> "Instead of positing a personal God, whose existence man can neither prove nor disprove, the ethical concept is founded on human experience. It is anthropocentric, not theocentric. Religion, for all the various definitions that have been given of it, must surely mean the devotion of man to the highest ideal that he can conceive. And that ideal is a community of spirits in which the latent moral potentialities of men shall have been elicited by their reciprocal endeavors to cultivate the best in their fellow men. What ultimate reality is we do not know; but we have the faith that expresses itself in the human world as the power which inspires in man moral purpose."
>
> * * *
>
> "Thus the 'God' that we love is not the figure on the great white throne, but the perfect pattern, envisioned by faith, of humanity as it should be, purged of the evil elements which retard its progress toward 'the knowledge, love and practice of the right.'"

Lord Snell, a former President of the British Ethical Union, described the non-theistic position of the Ethical Culture Movement as follows:

> "The central purpose of the Ethical Culture Movement is to establish in the world a religion devoted to the right, apart from supernatural sanctions * * * With regard to the ultimate nature of things, a life after death and the final goal of the universe, the Ethical

Movement affirms no creed. Its members may have divergent views on these problems but they unite in devotion to good action in the world in which they live."[5]

The viewpoint of the Humanist Movement has been set forth by Curtis W. Reese, Secretary, Western Unitarian Conference, as follows:

"To Humanism 'worship' means the reverential attitude toward all that is wonderful in persons and throughout all of life; a wistful, hopeful, expectant attitude of mind, not abject homage to either 'Humanity' or 'God' • • •

"Humanism is not Atheism. Atheism is properly used as a *denial* of God • • • [T]he Humanist attitude toward the idea of God is *not that of denial* at all; it is that of *inquiry*. The Humanist is questful; but if the quest be found fruitless he will still have his basic religion intact, viz., the human effort to lead an abundant life." (Reese, ed., *Humanist Sermons* (1927), pp. vii, viii. Emphasis in original.)

A more • statement of the non-theistic, humanistic approach t• oblems of belief is set forth in an article by Professo• . Nielson of Amherst College:[6]

"Religion is not a kind of science—not even a 'supra-science'; nor is it any other kind of a *theory*. It is instead a practical activity with some reasonably definite functions. Religious discourse is essentially a figurative, non-literal discourse • • • [R]eligious utterances are ritualistic or ceremonial utterances that express our basic commitments and concerns.

• • •

5 Quoted by W. Edv in Collier in *The Standard* (Jan.-Feb. 1951) p. 223.

6 Religion and the Modern Predicament, *The Humanist*. (Jan.-Feb. 1958) pp. 26, 28, 29.

"The function of religion in a culture in crisis (or for that matter in any culture) is to serve as a figurative expression of the regulative maxims that guide men's lives and express their ultimate concerns.

• • •

"I would argue that a resolute humanism is best able to meet men's religious needs in a democratic and scientifically oriented society • • • [It] can see the creativity in all religious expressions without assuming the uniqueness or dominance of any single symbolic form • • • [and] can see and assert the religious (ideal) qualities in natural experience.

• • •

"Humanism does not, as it is often parodied as doing, worship man's ego-centered image of his own divinity, though humanism quite rightly recognizes and emphasizes man's worth and dignity • • • The object of worship for a humanist is indeed man; but here the noun 'man' is understood collectively as denoting all mankind, and not as denoting man taken distributively with his masterless egocentric worship of his individual ego's lusts to power."

These samples of Humanist and Ethical Culturist nontheistic thought could be multiplied many times by quotations from world-renowned philosophers and psychologists. Alfred North Whitehead declared that "Religion is what the individual does with his own solitariness." A. Eustace Haydon conceives of religion as "the shared quest for the good life." Erich Fromm recognizes nontheistic as well as theistic religions and defines religion as "any system of thought and action shared by a group which gives the individual a frame of orientation and an object of devotion." And the celebrated biologist, Julian Huxley, has recently written:

"I have called this book *Religion without Revelation* in order to express at the outset my conviction that religion of the highest and fullest character can co-exist with a complete absence of belief in revelation in any straightforward sense of the word, and of belief in that kernel of revealed religion, a personal god." [7]

B. The History and Development of Non-Theistic Religion

The roots of the non-theistic religious movement in Western culture go far back. Such views are found in the Middle Ages, and during the renaissance there was a resurgence of non-theistic philosophy and a renewed interest in human problems and the concept of the dignity of man.[8] Non-theistic religious views are found in Jewish thought of the sixteenth and seventeenth centuries,[9] and in the writings of Spinoza,[10] Kant,[11] Auguste Comte, and John Stuart Mill.[12] In the early days of the United States, Benjamin Franklin, Thomas Jefferson, Thomas Paine and many oth-

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7 Whitehead, *Religion in the Making* (1926), p. 16; Haydon, as quoted in Morain, *Humanism as the Next Step* (1954), p. 12; Fromm, *Psychoanalysis and Religion* (1950), p. 21; Huxley, *Religion without Revelation* (1957), p. 1.

8 Kristeller, in Ferm, ed., *A History of Philosophical Systems* (1950), pp. 227-238; Cassirer, Kristeller and Randall, *The Renaissance Philosophy of Man* (1948).

9 Rivkin, *Leon da Modena and the Kol Sakhal* (1952), pp. 6-17.

10 Wolfson, *Philo: Foundations of Religious Philosophy in Judaism, Christianity and Islam* (1947), pp. 458-459.

11 Kant, *Critique of Pure Reason* (1781), Book II, §2, Chap. III, §7; Tsanoff, *The Great Philosophers* (1953), p. 455.

12 Aiken, ed., *The Age of Ideology: The 19th Century Philosophers* (1956), pp. 122-123; Mill, *Nature and the Utility of Religion* (1958), pp. 68-69.

ers expressed interest in the development of a religion based on reason rather than revelation.[13]

It was during the nineteenth century, however, that non-theistic religious movements developed significantly in American life. It was, in part, the revolt against dogmatism which led the New England Unitarians to transmute the traditional concept of divine Christ to the concept of a human Jesus, a great moral teacher and leader. William Ellery Channing, their most distinguished leader, said "the adoration of goodness—this is religion."[14] The transcendentalism of Emerson[15] and Thoreau[16] and the "manly theology" of Theodore Parker,[17] were primarily concerned with man and his relation to his fellow-man. Their basic concern was to subordinate inconclusive debate about the existence and nature of God to an attempt to improve human society by furthering humaneness in the relations between man and man.

After the Civil War, non-theistic religious movements in the United States began to multiply. Unlike the pre-Civil War groups, which had attempted to establish Utopian communities,[18] the newer movements continued to

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13 Schneider, ed., Benjamin Franklin; *The Autobiography and Selections* (1952) xiv, 57.

14 2 Parrington, *Main Currents of American Thought* (1930), p. 332.

15 Schneider, *A History of American Philosophy* (1946), Ch. 25; Blau, *Men and Movements in American Philosophy* (1952), pp. 121-131; Blau, ed., *American Philosophic Addresses, 1700-1900* (1946), pp. 586-604.

16 Blau, *Men and Movements in American Philosophy* (1952), pp. 131-141; Cargill, ed., Henry Thoreau: *Selected Writings on Nature and Liberty* (1952), pp. 56-107.

17 Schneider, *A History of American Philosophy* (1946) Ch. 24; Dirks, *The Critical Theology of Theodore Parker* (1948); Commager, *Theodore Parker* (1936).

18 Such communities included Brook Farm and Fruitlands, and the communal village of Modern Times (now called Brentwood) on Long Island in New York State. See Hinds, *American Communities* (2d ed. 1908).

live in the world and to attempt to change it by participating in social reforms. Out of the Unitarian group there began in 1866 the important Free Religious Association, which Emerson joined in his later years. The Association was most influential in its insistence that social reform activities were an integral part of religious faith, and in its refusal to make acceptance of theism a condition of membership.[19] Felix Adler, founder of the Ethical Movement, was a member of the Free Religious Association for ten years. He resigned its presidency in 1882 and devoted himself to the Society for Ethical Culture in New York City, which he had founded several years before, in 1876.

C. Non-Theistic Belief Is Today Recognized as Religious.

A clear recognition of the religious character of non-theistic belief is shown, we believe, by the proceedings at a Seminar on Religion in a Free Society, held in New York City in 1958 under the sponsorship of the Fund for the Republic, Inc. In the first session of this seminar, Father John Courtney Murray, one of the leading Roman Catholic theologians in the United States, read the principal paper: *Religious Pluralism and Civil Unity.* One theme to which Father Murray devoted particular attention was the existence in the United States of four major religious groupings. These were the three traditional major religions of Roman Catholicism, Protestantism and Judaism, and a fourth, to which Father Murray assigned the name "Secularist."[20]

At the final session of the seminar, Father Joseph Gremillion took note of Father Murray's fourth grouping, and pointed out that formal presentations had been made only

19 Persons, *Free Religion, An American Faith* (1947), pp. 71, 154.

20 *Religion and Freedom.* Report by Donald McDonald on a Seminar sponsored by the Fund for the Republic (1958), pp. 5-7.

by representative spokesmen of the first three faiths. He urged that a "secularist" be called upon. Professor Horace Kallen of the New School for Social Research in New York City was granted permission to, and did, address the group on behalf of the "fourth faith," the secularist or non-theistic.[21]

The substance of Professor Kallen's address is here unimportant. The important thing is that at this seminar, which was probably the most significant inter-faith gathering held in the United States for many years, the fourth group, whether called "secularist," "non-theistic," or any other name, was recognized by the more than one hundred participants as entitled to a voice in the religious discussions and deliberations of a free society.

A widely-used authoritative survey of American religious beliefs and practices similarly points out the truly religious character of these non-theistic movements, which are described as "nonecclesiastical spiritual movements." It states:[22]

> "Unfortunately this aspect of America's religious life has been the object of but little serious study. Most of these movements do not gain their chief impetus from an organization, their major tenets are almost never set down in formal creeds; and statistics on the number of adherents are either meager or nonexistent • • • Yet such knowledge as we have forces us to the conclusion that these nonecclesiastical movements furnish the vital spiritual orientation of multitudes of the American people • • • and must be taken into account in any realistic appraisal of the religious situation in the United States."

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21 *Religion and Freedom, supra*, note 20, pp. 47-48.

22 Williams, *What Americans Believe and How They Worship* (1952), pp. 351-352.

Neither Buddhism nor Confucianism professes belief in a Supreme Being;[23] yet both are unquestionably regarded and treated as religions. To quote an interesting recent case in California:

> "* * * there are forms of belief generally and commonly accepted as religions and whose adherents, numbering in the millions, practice what is commonly accepted as religious worship, which do not include or require as essential the belief in a deity. Taoism, classic Buddhism, and Confucianism, are among these religions." *Fellowship of Humanity* v. *County of Alameda, et al.*, 153 Cal. App. 2d 673; 315 P.2d 394 (1957).

Thus, to exclude non-theistic belief from the constitutional concept of "religion" would be to exclude, among others, some of the major faiths of the world which are traditionally recognized as "religions."

D. Any Impingement on the Religious Freedom of Some is a Threat to the Religious Freedom of All.

As we have shown, the "fourth faith," the "nonecclesiastical spiritual movements" which do not affirmatively proclaim belief in a Supreme Being, are today important segments of the American religious community. They are, in fact and in law, just as much religions as the traditional faiths which profess a belief in the traditional concepts of God. As such, they, too, are entitled to the full measure of the protection of religious freedom guaranteed by the Constitution.

It is not just the religious freedom of the non-theistic groups which is at stake. Religious freedom is indivisible.

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23 Potter, *The Story of Religion* (1939), xvii-xviii; Archer, *Faiths Men Live By* (1934), p. 270; Hutchinson and Martin, *Ways of Faith* (1953), p. 134.

Any encroachment upon the religious freedom of some must ultimately lead to a weakening of the religious freedom of all. As Professor Joseph L. Blau of Columbia University has written:[24]

> "Under a system such as ours, which maintains the right of the individual to free choice among religious positions, freedom to reject is as allowable as freedom to accept. There is nothing in the written or unwritten traditions of the United States that limits the individual to a choice among patterns of acceptance. In fact, a limitation of this sort is undesirable. Once the precedent is established that the choice must be among prescribed alternatives, it would become easier to narrow the list of alternatives until the language of choice is used in the real absence of choice, as in totalitarian elections. The same freedom to believe, to associate, to speak, to preach, to missionize, and to prophesy must be granted to atheist and theist, agnostic and gnostic, anti-clerical and clergyman, heterodox and orthodox. The rights of those who believe in unbelief must be defended in order to place a secure foundation under the rights of those who believe in belief."

The same thought was expressed by Mr. Justice Jackson in his dissenting opinion in *Zorach* v. *Clauson*, 343 U. S. 306, 325 (1952):

> "The day that this country ceases to be free for irreligion it will cease to be free for religion—except for the sect that can win political power. * * * [I]f we concede to the State power and wisdom to single out 'duly constituted religious' bodies * * * it would be logical to also uphold the power and wisdom to choose

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24 Blau, *Cornerstones of Religious Freedom in America* (1949), p. 15.

> the true faith among those 'duly constituted.'. We start down a rough road when we begin to mix compulsory public education with compulsory godliness."

If it be once established that the State has the *power* to require a declaration of a belief in the existence of God as a condition to holding public office, it is only a short step for the State to require that the belief be in a particular God. The only way effectively to protect the basic religious freedoms which the Constitution guarantees to all Americans—the right to worship or not to worship, to believe in God or not to believe in God, or to hold any theological belief an individual wishes—is to deny the State *any* power to impose a religious test for holding public office. The denial by the State of Maryland of a Notary Public's Commission to appellant solely because of his refusal to declare his belief in God violates this salutary principle.

Conclusion

The judgment of the Court of Appeals of Maryland should be reversed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

October Term, 1960

No. 373

ROY R. TORCASO,

Appellant,

against

CLAYTON K. WATKINS, Clerk,

Appellee.

On Appeal from the Court of Appeals of the State of Maryland

BRIEF OF AMERICAN JEWISH COMMITTEE, ANTI-DEFAMATION LEAGUE OF B'NAI B'RITH, and UNITARIAN FELLOWSHIP FOR SOCIAL JUSTICE, *AMICI CURIAE*

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IN THE

Supreme Court of the United States

October Term, 1960

No. 373

ROY R. TORCASO,

Appellant,

against

CLAYTON K. WATKINS, Clerk,

Appellee.

On Appeal from the Court of Appeals of the State of Maryland

BRIEF OF
AMERICAN JEWISH COMMITTEE,
ANTI-DEFAMATION LEAGUE OF B'NAI B'RITH,
and
UNITARIAN FELLOWSHIP FOR SOCIAL JUSTICE,
AMICI CURIAE

Interest of the *Amici*

We deem it appropriate to state at the outset that the constituency of each of the *amici* includes vast numbers of people who not only believe in the existence of God, but also devoutly worship God.

The American Jewish Committee, formed in 1906, was incorporated by Act of the Legislature of the State of New York in 1911. Its Charter states:

> The objects of this corporation shall be, to prevent the infraction of the civil and religious rights of Jews, in any part of the world; to render all lawful assistance and to take appropriate remedial action in the event of threatened or actual invasion or restriction of such rights, or of unfavorable discrimination with respect thereto.

The B'nai B'rith, founded in 1843, is the oldest civic service organization of American Jews, which represents a membership of more than 350,000 men and women and their families. The Anti-Defamation League was organized in 1913 as a section of the parent organization to advance goodwill and proper understanding between Americans and translate into greater effectiveness the ideals of American democracy. It is, therefore, dedicated to the protection of freedom of religion and combatting religious discrimination.

The Unitarian Fellowship for Social Justice was established in 1908 by Dr. John Haynes Holmes and other Unitarians. It welcomes all who seek to transform their ideals of social justice into living reality. Its purpose is "to provide a channel for united action in behalf of social justice and to enable its members to sustain one another in the application of their religious ideals to the needs of the times."

It has been among the fundamental tenets of the organizations which appear as *amici curiae* herein that the welfare and the security of members of minority religious groups in the United States depend upon the preservation of constitutional guarantees for all; that an invasion of the rights of any religious group is ultimately a threat to the religious freedom of all groups and to the individual members thereof.

The holding of the Maryland Court of Appeals was that under the State Constitution disbelief in the existence of a Supreme Being renders a person incompetent to hold

public office. The Court stressed that religious toleration did not, at least in the State of Maryland, "encompass the ungodly." In the course of its decision, the Court of Appeals equated disbelief in a Supreme Being with "the denial of any moral accountability for conduct * * *."

While this case directly affects the right of one who does not believe in the existence of God, to hold a position as Notary Public, the grounds of the decision and the constitutional provision sustained by the Court below affect many persons with unorthodox or non-theistic religious beliefs. Notwithstanding the fact that the *amici curiae* herein are organizations of people who believe in God, the decision of the Maryland Court of Appeals is a matter of deep concern to them because they believe that it limits the possibility of different views of the relationship of God and man. If a division of government is permitted to define what is orthodox in religious beliefs, it may some day attempt to define heresy. Minority religious groups can prosper only in an open society where each man's conscience, and not the state, determines what, if any, shall be his relationship to ultimate causes. Therefore, the *amici* fear that if the state, through administrative, judicial or legislative action can determine today that members of a group must be theistic to enjoy the benefits of public employment, then a precedent will be created under which the state may attempt, at some future time, to dictate the nature of the Supreme Being in which people must believe in order to be accepted as full citizens in our society.

The *amici* who have joined in this brief agree with the late Mr. Justice Jackson who said that the "day that this country ceases to be free for irreligion, it will cease to be free for religion—except for the sect that can win political power." *Zorach* v. *Clauson*, 343 U. S. 306, 325 (1952).

For these reasons, the American Jewish Committee, the Anti-Defamation League of B'nai B'rith and the Unitarian Fellowship for Social Justice join in filing this brief *amici curiae* with the consent of the parties.

Statement of the Case

The facts of this case are undisputed. The Governor of Maryland appointed the appellant, upon his proper application, to the position of Notary Public in and for Montgomery County (T. 2).[1] In accordance with instructions, the appellant presented himself to the appellee, the Clerk of the Circuit Court for such county, to obtain his commission. The appellee asked the appellant to subscribe to the following oath and declaration:

State of Maryland }
Montgomery County } ss.:

In the presence of Almighty God, I, Roy R. Torcaso, do solemnly promise and declare that I will support the Constitution of the United States; and that I will be faithful and bear true allegiance to the State of Maryland, and support the Constitution and Laws thereof; and that I will, to the best of my skill and judgment, diligently and faithfully without partiality or prejudice execute the office of

Notary Public of
The State of Maryland
in and for
Montgomery County

according to the Constitution and Laws of this State. I, Roy R. Torcaso, do declare that I believe in the existence of God.

_____

Sworn to and subscribed before me, Clerk of the Circuit Court for Montgomery County, at Rockville, Maryland, this _____ day of _____ AD, 19_____

TEST:

_____ Clerk (T. 3)

1. The capital letter T followed by a number, refers to the page of the printed Transcript of Record.

The appellant refused to subscribe to the declaration concerning his belief in the existence of God because he does not believe in the existence of God. Thereupon, the appellee refused to issue the commission to the appellant, who then filed a petition for writ of mandamus in the Circuit Court for Montgomery County, asking that the appellee be directed to issue the commission of Notary Public to the appellant (T. 1-5). Upon demurrer (T. 6), the Circuit Court dismissed the petition (T. 7-11).

The appellant appealed to the Maryland Court of Appeals which affirmed the lower Court's decision (T. 12-19). The opinion of the Court below appears at 223 Md. 49. The appellant, thereupon, appealed to this Court which noted probable jurisdiction on November 7, 1960 (T. 23).

The Question Presented

This case presents this Court with the question whether a provision of a state constitution, requiring a declaration of the belief in the existence of God as a prerequisite for any public office of profit or trust, is in conflict with the establishment of religion and free exercise clauses of the First Amendment and the due process and equal protection clauses of the Fourteenth Amendment to the United States Constitution (T. 21).

Summary of Argument

Article 37 of the Declaration of Rights of the Maryland Constitution establishes a religious standard for public office, thereby penalizing persons on religious grounds in violation of the First Amendment to the United States Constitution. The requirement applies not only to notaries public but to all state offices, including members of the state legislature, judges and school teachers. It incapaci-

tates not only atheists but also agnostics, persons who have doubts as to what the term "God," as used in Article 37, means and adherents of non-theistic religions.

The First Amendment, made applicable to the states by the due process clause of the Fourteenth Amendment, prohibits by its establishment clause laws aiding all religions, as well as laws under which a person may be punished for professing religious beliefs or disbeliefs. While *Zorach* v. *Clauson*, 343 U. S. 306 (1952) permitted the state to accommodate some of its functions to the spiritual needs of religious groups, Article 37 does more than that; it incapacitates and penalizes persons on religious grounds. Thus, it also violates the free exercise clause of the First Amendment. Furthermore, Article 37 affects freedom to believe which is absolute.

Religious tests were crucial issues in the struggle for religious freedom in the United States. The Virginia Bill for Establishing Religious Freedom outlawed religious tests and was the precursor of Article VI of the Federal Constitution. The First Amendment expanded and broadened this aspect of religious freedom and necessarily includes the prohibition on religious tests.

The constitutional infirmity of Article 37 is demonstrated by Article 36 of the Declaration of Rights of the Maryland Constitution which incapacitates non-believers in God from giving testimony in civil or criminal courts, thus stripping such persons of the essential attributes of citizenship.

Whether public employment is regarded as a right or a privilege, qualifications established by the state for such employment must accord with constitutional requirements of due process and equal protection. Article 37, by incapacitating persons who are unwilling to express belief in God, from being appointed to public office, is arbitrary and discriminatory in that it bars persons on religious grounds and thus violates the Fourteenth Amendment.

ARGUMENT

POINT I

Maryland's constitutional requirement of a declaration of belief in the existence of God as a prerequisite for public office violates the First Amendment of the United States Constitution.

A. Scope and Meaning of Article 37 of the Declaration of Rights of the Maryland Constitution

Article 37, which appears in the Declaration of Rights of the Maryland Constitution, reads as follows:

> That no religious test ought ever to be required as a qualification for any office of profit or trust in this State, other than a declaration of belief in the existence of God; nor shall the Legislature prescribe any other oath of office than the oath prescribed by this Constitution.

By its very language, the declaration of belief in the existence of God, which Article 37 characterizes as a "religious test," is required not only of notaries public, but for all offices of "profit or trust" in the State of Maryland. Thus, members of the state legislature, judges, lawyers, public school teachers, municipal employees and all other persons on the public payroll or holding any official title may be required to declare their belief in the existence of God to qualify for office. The Court of Appeals of Maryland, which has "the last word" in ascertaining the meaning of the State Constitution, has interpreted Article 37 in its opinion below (T. 16), as a self-executing requirement for "every official" and thus precluded this Court from interpreting Article 37 as permissive rather than mandatory. *Watson* v. *Buck*, 313

U. S. 387, 401 (1941); *Speiser* v. *Randall*, 357 U. S. 513 (1958); Anno., 83 L. Ed. 520, 521-22 (1938).

The petitioner in the instant case is an atheist, a term which has been defined judicially as describing "one who does not believe in the existence of a God." *Gibson* v. *American Mutual Life Ins. Co.*, 37 N. Y. 580, 584 (1868).

The constitutional requirement of Article 37, however, has a much broader sweep. It disqualifies all "who do not express their feeling toward ultimate issues of existence in any creedal form" *Everson* v. *Board of Education*, 330 U. S. 1, 45 (1947) or who "profess a * * * disbelief in any religion" (*id*, at 15). Agnostics, infidels, humanists, persons with doubts as to the meaning of "God" as used in Article 37 and adherents of non-theistic religions would be barred.

a. An agnostic is defined in Webster's *New World Dictionary*, Encyclopedic Edition (1951), as a person who thinks it is impossible to know whether there is a God or a future life, or anything beyond material phenomena. The word was apparently coined by Thomas Henry Huxley in 1869 to describe one who felt that the ultimate nature of things, including the existence of a God, is "unknown and probably unknowable." Evans and Evans, *Dictionary of Contemporary American Usage*, p. 21.

b. An infidel is "an unbeliever." The word was, until recently, applied by Christians to Mohammedans and "among Mohammedans to Jews and Christians." In recent years, there has been a tendency to give the word "a wider significance and have it apply to agnostics and atheists." *id.* at 21.

c. Humanists have been described as those with a "temperamental resistance to ecclesiastical and political authority." Humanists include those with a "conviction that man himself is the center of the Universe." Humanism is "a

basis for certain modern schools of philosophy and religion". 7 *Encyclopedia of the Social Sciences*, 540 (1935 ed.). "In the main it has been antagonistic to positive and authoritative religious belief." *ibid.*

d. Of course, the term "God" as used in the Maryland Constitution is not readily definable. It carries with it centuries of philosophical and theological disputation and varies in meaning not just from one sect to another, but from one individual to another. Any one who has genuine doubts concerning the meaning of the term as used in Article 37, might consider himself unable to make the declaration in good faith, even though he himself may believe in a Creator, a Supreme Being or Divine Providence.

e. An imposing list of distinguished authorities, writers, scholars, and teachers can be cited in support of the proposition that belief in a Supreme Being is not essential to religion. These views are assembled in places ranging from popular journals to technical disquisitions. *Life* magazine, on February 7, 1955, introduced its distinguished series of articles on "The World's Great Religions" in this way:

> Here will be set forth the religious beliefs and customs of most of the world's people.
>
> The faiths of more than half of these people are alien to Western Civilization. However unfamiliar their beliefs and however divided into religions and sects, these people seek truth. But truth means different things to different people—the word truth itself having different connotations in the civilizations of the East from those of the West. But always it means a search for answers to the mysteries of reality, of the soul, of the purpose of life. This goal takes man on many paths—the direct way of simple faith, the byway of metaphysics. (p. 57).

The editors of *Life* avoided defining religion in terms of the God concept. On the contrary, *Life* (having relied on painstaking research)[2] interpreted the term religion as including those movements seeking various answers to the "mysteries of reality, of the soul, of the purpose of life."

Henry Nelson Wieman, formerly of the University of Chicago Divinity School, writes:

> In many religions, the most sustaining and protecting behavior is called God. But whether it is called God or not, every religion either finds or searches for something that will provide these major goods and save from these major evils. Wieman, *The Wrestle of Religion with Truth*, p. 135.

Professor Vergilius Ferm, Compton Professor and head of the Philosophy Department at the College of Wooster, Ohio, and one of this country's authorities on church history, in his article "Religion, the Problem of Definitions," in the *Encyclopedia of Religion* (1945) lists among the common errors made in attempts to define religion: the inadequacy of reliance upon etymology; the use of definitions which suffer from vagueness, narrowness, or from such broadness as to lose all significance; the failure to recognize that religion affects all of man's being and not merely his beliefs or his feelings or his activities. Listed by Ferm as a "tenth mistake" is the definition of the term religion in connection "with a God concept."

> Two considerations appear here: how are those persons to be classified who behave in ways very much like conventional religious theists but who do not believe in God (in any conventional sense)?

---

2. In the "Credits" listed in the preface to the bound volume based on the magazine series, subsequently published by Time Incorporated, indebtedness for contributions and assistance was noted to some of the most prominent religious authorities and institutions in the world.

Furthermore, a person may well assert his belief in a deity without his being religious.

* * * *

In light of the above * * * the following statements seem wholly justifiable: "*To be religious* is to effect in some way and in some measure a vital adjustment (however tentative and incomplete) to whatever is reacted to or regarded implicitly or explicitly as worthy of serious and ulterior concern." Again, "*a religion* is a set of meanings and behaviors having reference to individuals who are or were or could be religious." Again, "religion is a generic term referring to all conceivable religions; formal or informal." (italics in the original.) Ferm, *Encyclopedia of Religion*, p. 646-7.

Professors Conrad Henry Moehlmann of Rochester Theological Seminary,[3] William Warren Sweet of the University of Chicago,[4] Edwin A. Burtt of Cornell University,[5] Charles Samuel Braden of Northwestern University,[6] James H. Leuba of Bryn Mawr College,[7] and other teachers and writers on religion and church history recognize that non-theistic religions exist in the United States today, that they are a development of the liberal churches, and that some of them not only doubt but even deny the existence of any God "other than the God resident in the human will-to-goodness." Sweet, *The Story of Religions in America*, p. 514 ff.

It is thus clear that there are many distinguished theological authorities, teachers and scholars who define reli-

3. *Religion in the Twentieth Century*, Ferm, editor, p. 266.

4. *The Story of Religions in America*, p. 514 ff.

5. *Types of Religious Philosophy*, p. 350 ff.

6. *These Also Believe*, p. 468.

7. *The Reformation of the Churches*, pp. 21 ff., 201.

gion in terms other than those involving belief in a God or Supreme Being.

Not only atheists and agnostics, but many deeply religious people who seek the explanation of ultimate causes in non-theistic terms, would thus be disqualified under Article 37 of the Maryland Constitution. Among such people would be followers of the Ethical Culture Movement, Secular Humanists, Taoists, Buddhists and others. *Washington Ethical Society* v. *District of Columbia*, 249 F. 2d 127 (1957); *Fellowship of Humanity* v. *County of Alameda*, 153 A. C. A. (Cal.) 755 (1957); Archer, *Faiths Men Live By* (1934), p. 272.

B. The "Establishment of Religion" Clause of the First Amendment

The first Amendment to the United States Constitution provides, in part, as follows:

> Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof • • •

This provision against action by Congress has been held equally applicable to action by the states or any of their political subdivisions. *Cantwell* v. *Connecticut*, 310 U. S. 296 (1940); *Murdock* v. *Pennsylvania*, 319 U. S. 105 (1943).

The "establishment of religion" clause has been defined by this Court in three recent decisions: *Everson* v. *Board of Education*, 330 U. S. 1 (1947); *McCollum* v. *Board of Education*, 333 U. S. 203 (1948) and *Zorach* v. *Clauson*, 343 U. S. 306 (1952). There was no disagreement between the majority and minority opinions in *Everson* on the following definition:

> The "establishment of religion" clause of the First Amendment means at least this: Neither a state nor

the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force or influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa. In the words of Jefferson, the clause against establishment of religion by law was intended to erect "a wall of separation between church and State." 330 U. S. at 15-16; see also 41, 52, 53, 59, 60.

In *McCollum* this definition of the establishment clause was the basis for a determination that a released time program in the public schools of Champaign, Illinois violated the First Amendment. Under that program, children attending public schools were released one hour during each week to receive religious instruction within the school buildings from teachers provided and paid by religious groups. In an eight to one decision, this Court struck down that plan quoting with approval the *Everson* definition of "establishment of religion." 333 U. S. at 210-211.

This Court's interpretation of the meaning of "establishment of religion" was in no way weakened or modified by its subsequent decision in *Zorach* v. *Clauson, supra*, upholding the New York released time program. This Court distinguished the facts in that case from those in the *McCollum* case, since the New York program did not involve use of public school buildings for religious instruc-

tion. The Court expressly re-affirmed the principle enunciated in *Everson* and *McCollum*—"We follow the *McCollum* case." *Zorach* v. *Clauson*, 343 U. S. at 315.

In *Zorach*, this Court refused to strike down a program of off-premises released time for religious education on the ground that the institutions of the State were merely making an "adjustment" to "accommodate the religious needs of the people." at 315. The opinion stressed the voluntary nature of the program. The majority argued that to hold otherwise on the facts before the Court "would be preferring those who believe in no religion over those who do believe." at 314.

None of these arguments is applicable here. Article 37 of the Declaration of Rights of the Maryland Constitution involves no "adjustment" or "accommodation"; it incapacitates from holding public office those who fail to meet a religious test—belief in the existence of God. It is not voluntary, but coercive. Without exceptions, it bars persons who cannot meet the religious test from holding any public office of trust or profit. Far from preventing preferential treatment of non-believers over believers, Article 37 denies equality of treatment to believers and non-believers. In fact, it prefers believers over non-believers and thus is blatantly inconsistent with *Everson*, *McCollum* and *Zorach*. As this Court there held, the First Amendment bars any State from preferring "one religion over another" without distinguishing between theistic and non-theistic religions. The states are further barred from punishing any person "for entertaining or professing religious beliefs or disbeliefs * * *." *Everson* v. *Board of Education*, 330 U. S. at 15-16.

The majority opinion in the *Zorach* case, in the course of discussing off-premises released time programs for religious education, said: "We are a religious people whose institutions presuppose a Supreme Being." *Zorach* v. *Clauson*, 343 U. S. at 313. Obviously, all that Mr. Justice Douglas intended to express was the thought that a ma-

jority, perhaps a vast majority, of our people are members or adherents of those religious sects and denominations which predicate their beliefs on the existence of a Supreme Being. Certainly, he could not have intended to say that every one of our people believes in the existence of a Supreme Being or that the failure of a person so to believe may be the basis for depriving him of First Amendment rights—which is the effect of Article 37. Hence, when the Court of Appeals of Maryland cited that sentence from *Zorach* in its decision sustaining Article 37 (T. 18), it read into the sentence a meaning which neither its author nor this Court could have intended.

C. The "Free Exercise" Clause of the First Amendment

The purpose of both the "establishment" and the "free exercise" clauses of the First Amendment is to assure religious freedom. This Court in *Everson* characterized these two clauses as "complementary" and reaffirmed their interrelationship. 330 U. S. at 15. The objective of the First Amendment was there declared to be to secure "religious liberty from the invasion of the civil authority."

Thus, the First Amendment places religious beliefs or disbeliefs completely "beyond the reach of law." Government is barred from interfering "with organized or individual expression of belief or disbelief." *Minersville School District* v. *Gobitis*, 310 U. S. 586, 593 (1940).[8] This restriction rests, not upon any hostility to religion, but upon the "premise that both religion and government can best work to achieve their lofty aims if each is left free from the other within its respective sphere." *McCollum* v. *Board of Education*, 333 U. S. at 212. As Mr. Justice Frankfurter wrote in his concurring opinion in

8. The holding in *Minersville School District* v. *Gobitis* was overruled in *West Virginia State Board* v. *Barnette*, 319 U. S. 624 (1943), not because of disagreement with the quoted language, but because the earlier decision was considered insufficiently protective of the constitutional guarantee of religious freedom.

McCollum (at 232): "We have staked the very existence of our country on the faith that complete separation between the state and religion is best for the state and best for religion," citing *Everson* v. *Board of Education*, 330 U. S. at 59.

The "liberty" guaranteed to every person by the Fourteenth Amendment against deprivation without due process of law, places the state governments in the same position as the federal government with respect to their incompetence to legislate on religious beliefs or disbeliefs. *Cantwell* v. *Connecticut, supra; Murdock* v. *Pennsylvania, supra; McCollum* v. *Board of Education, supra.*

A constitutional provision which disqualifies a person from public office because of his beliefs or disbeliefs concerning his relationship to ultimate causes, penalizes him for religious convictions. Such a disqualification restricts freedom of religion just as effectively as though the state were to impose a tax upon those holding unorthodox religious views or were to deny them tax exemption allowed to orthodox religious groups.

In *Speiser* v. *Randall*, 357 U. S. 513 (1958), this Court was called upon to determine whether the First Amendment's guarantee of freedom of speech was violated by a statute of the State of California requiring applicants for tax exemption to declare that they do not engage in certain activities involving advocacy of political beliefs.

In that case, this Court said that a discriminatory denial of tax exemption for advocacy "is a limitation on free speech." *Speiser* v. *Randall*, 357 U. S. at 518.

The Court recognized the capacity of the taxing power to limit free speech:

> To deny an exemption to claimants who engage in certain forms of speech is in effect to penalize them for such speech. Its deterrent effect is the same as if the State were to fine them for this speech. *Ibid.*

Just as the petitioner in *Speiser* v. *Randall* was penalized by the withholding of tax exemption for the exercise of his constitutionally protected right of freedom of speech, so in the case at bar the petitioner is penalized by the withholding of public office for the exercise of his equally protected right of freedom of religion. Certainly, no distinction can be drawn between the two cases because *Speiser* involved freedom of speech and the case at bar involves freedom of religion.

In *Speiser* v. *Randall* this Court assumed, without deciding, that a state could withhold tax exemption and thus limit freedom of speech where it takes the form of an activity for which the speaker "might be fined or imprisoned." 357 U. S. at 520. We are aware of *Dennis* v. *United States*, 341 U. S. 494 (1951) in which this Court interpreted the "clear and present danger" doctrine in relation to freedom of speech. But we submit that it would be absurd to claim that Article 37 can be sustained on the theory that the absence of belief by any individual in the existence of God constitutes a "clear and present danger" to the State. Furthermore, it should be noted that Article 37 is not concerned with action, but with mere belief. While "conduct remains subject to regulation for the protection of society," freedom of belief, this Court has held, "is absolute." *Cantwell* v. *Connecticut*, 310 U. S. 296, 303 (1940). See also, *Reynolds* v. *United States*, 98 U. S. 145 (1878). This rule has been recognized in Maryland. *Hopkins* v. *State*, 193 Md. 489, 496 (1949):

A requirement of belief in the existence of God, such as appears in Article 37, poses a real dilemma for many persons with unorthodox religious beliefs. Their choice is to resign themselves to disqualification for any office of trust or profit under the State or to conceal or betray their deepest convictions. Under the First Amendment, no State should be permitted to require such a choice of its citizens. Whether a person does or does not believe in God, as well as the kind of God in which he believes, is

beyond the competence of state scrutiny in our constitutional democracy. The late Mr. Justice Jackson affirmed this principle in his ringing statement:

> If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us. *West Virginia State Board of Education* v. *Barnette*, 319 U. S. 624, 643 (1943).

D. The Constitution and Religious Tests for Office

Religious tests for public office were characteristic in England and in its colonies in the New World as devices to exclude those whose religious beliefs did not conform to the sects established or recognized by the ruling authorities. In pre-Revolutionary War days, Maryland and Massachusetts required a belief "in the Christian religion" while Georgia, New Hampshire, New Jersey and North Carolina required a belief in Protestantism as a test for public office holders. Pennsylvania required a belief that God was "the rewarder of the good and the punisher of the wicked." Stokes, *Church and State in the United States*, Vol. I., p. 274 (1950). Jews were permitted to hold public office only in Rhode Island, New York, New Jersey and Virginia. Johnson and Yost, *Separation of Church and State*, p. 25 (1948). As late as 1776, Delaware adopted a requirement that all seekers for public office certify their "faith in God the Father, and in Jesus Christ, His only Son, and in the Holy Ghost, one God, blessed forever more." 1 Stokes, *supra*, 274.

Such restrictions on qualifications for public office, understandably, became onerous in the multisectarian, plur-

alistic society which came to exist in the colonies. The problem was first tackled in Virginia where the establishment of the Church of England led to persecution and oppression until just before the Revolutionary War. In 1785, the Virginia Assembly adopted a bill for establishing religious freedom which became law on January 16, 1786. While Jefferson was almost entirely responsible for its composition, Madison was the leading force in carrying it through the Assembly. 1 Stokes 392; Randall, *The Life of Thomas Jefferson*, Vol. 1, pp. 219-220 (1858). In its preamble, the bill stated: "That all attempts to influence [the mind of man] by temporal punishments or burdens, or by civil incapacitations, tend only to beget habits of hypocrisy and meanness * * *." The preamble further stated that: "Proscribing any citizen as unworthy the public confidence by laying upon him an incapacity, of being called to [the] offices of trust and emolument, unless he profess or renounce this or that religious opinion, is depriving him injurously of those privileges and advantages to which, in common with his fellow-citizens, he has a natural right." And the preamble also stated that "the opinions of man are not the object of civil government, nor under its jurisdiction; that to suffer the civil magistrate to intrude his powers into the field of opinion and to restrain the profession or propagation of principles on [the] supposition of their ill tendency is a dangerous fallacy, which at once destroys all religious liberty * * *." XII Hening's Statutes of Virginia (1823) 84.

The momentum of the Virginia struggle for religious liberty carried over into the Constitutional Convention in which members from Virginia played a prominent part. On May 29, 1787, Charles Pinckney of South Carolina proposed for formal consideration the following language:

> The Legislature of the United States shall pass no law on the subject of religion.

The proposal was referred to the committee of the whole house. On July 24, 1787, this committee was discharged from further consideration of Pinckney's proposal. It was then turned over to the committee on detail appointed to draft the Constitution on the basis of the Convention's proceedings. Nothing more is recorded of this proposal in the accounts of the Convention.

On August 20, 1787, Charles Pinckney placed a second and narrower proposal before the Convention:

> No religious test or qualification shall ever be annexed to any oath of office under the authority of the United States.

On August 30, this proposal, with some minor changes, was adopted unanimously for inclusion in the Constitution. It became the last clause of the third paragraph of Article VI. 1 Stokes, *supra*, 526-7.

The omission from the Constitution of specific guarantees of a number of basic freedoms led some states to insist upon the adoption of such guarantees as a condition to their ratification. Several of the states insisted on broader guarantees of freedom of religion than that provided by the ban on a religious test for office in Article VI. Rutledge, dissenting opinion in *Everson* v. *Board of Education*, 330 U. S. at 39. The ultimate result was the religious clause incorporated in the First Amendment, which strongly resembles Pinckney's suggested language and which, like the latter, is a model of brevity and conciseness:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; * * *

While the prohibition of Article VI deals with one specific aspect of the establishment of religion—qualifications for public office—the First Amendment expands and broad-

ens this prohibition. It bans any aspect of the establishment of religion. Its guarantee outlaws every device which has traditionally been used to place dissenters and adherents of religious minorities in a disadvantageous position, as compared with members of the dominant group or groups. One of these devices, used extensively throughout colonial times, was the religious test as a prerequisite for public office. It is inconceivable that the prohibition against religious tests should not be considered to be embraced within the broader guarantees against any establishment of religion and assuring its free exercise as contained in the First Amendment. Even if Article VI had never been part of the original Constitution, certainly religious test oaths would have been banned as a result of the enactment of the First Amendment.

The prohibitions of the First Amendment, originally addressed to Congress and the federal Government, were later held by this Court to be applicable to the states through the due process clause of the Fourteenth Amendment. *Cantwell* v. *Connecticut, supra; Murdock* v. *Pennsylvania, supra; Everson* v. *Board of Education, supra; McCollum* v. *Board of Education, supra.* Hence, the states, as well as the federal government, are barred from imposing religious qualifications of any kind as a condition for public office. Article 37 of the Declaration of Rights requiring a declaration of belief in the existence of God from every applicant for an office of profit or trust is in irreconcilable conflict with this ban.

E. Article 36 of the Declaration of Rights of the Maryland Constitution

To support its decision upholding the constitutionality of Article 37, the Maryland Court of Appeals referred to Article 36 of the Declaration of Rights of the State Constitution which, after guaranteeing "religious liberty," provides:

> • • • nor shall any person, otherwise competent, be deemed incompetent as a witness, or juror, on account of his religious belief; provided, he believes in the existence of God, and that under His dispensation such person will be held morally accountable for his acts, and be rewarded or punished therefor either in this world or in the world to come.

Far from supporting the position of the respondent, we believe Article 36 proves the vice of constitutional provisions examining into the religious beliefs, convictions or motivations of people, or the absence thereof. Under the express language of Article 36, as interpreted by the Maryland Court of Appeals, a person unwilling to certify to his belief in God is disqualified, not only from holding any public office of profit or trust, but also from giving testimony in any civil or criminal proceeding. *Torcaso* v. *Watkins*, 223 Md. 49, 59 (1960) (T. 19). This could include a lawsuit to which he is a party and to the success of which his testimony may be essential. The limitations imposed by Article 36 upon those who cannot conscientiously declare their belief in the existence of God, are far-reaching indeed. A citizen who is incapacitated from using the civil courts to protect and defend his rights and property is but a step above an outlaw.

What would happen, one might speculate, if a member of the Ethical Culture Society, a secular humanist or a Buddhist were charged with a crime in Maryland, or was plaintiff or defendant in civil litigation, and wanted to testify in his own behalf?

POINT II

Maryland's constitutional requirement of a declaration of belief in the existence of God as a prerequisite for public office violates the Equal Protection and Due Process clauses of the Fourteenth Amendment of the United States Constitution.

Whether the opportunity to hold a public office of trust or profit is classified as a right or a privilege, it is clear that the state may not establish conditions for such employment which are unreasonable, unlawful or discriminatory. Once the state undertakes to establish criteria for filling public office, it is bound by the Fourteenth Amendment's due process and equal protection clauses in the formulation of those criteria. *Slochower* v. *Board of Higher Education of the City of New York*, 350 U. S. 551, 555 (1956). The establishment of any arbitrary or unreasonable standard for public office violates due process. *Wieman* v. *Updegraff*, 344 U. S. 183, 192 (1952).

A religious test for public office has always been deemed unreasonable under our constitutional democracy. The prohibition on such tests in Article VI of the Constitution clearly demonstrates this.

> The Catholic and the Protestant, the Calvinist and the Arminian, the Jew and the Infidel, may sit down at the common table of the national councils, without any inquisition into their faith, or mode of worship. Story, *Commentaries on the Constitution of the United States*, Sec. 1879.

In a country without an established religion, where religious belief or disbelief is accepted as a private matter for the individual and his own conscience, philosophy and responsibility, any state-imposed religious test is neces-

sarily arbitrary and unreasonable. "The test oath is abhorrent to our tradition." *Girouard* v. *United States*, 328 U. S. 61, 69 (1946). "Test oaths are notorious tools of tyranny. When used to shackle the mind they are, or at least they should be, unspeakably odious to a free people." *Wieman* v. *Updegraff*, *supra*, at 193.

The reasoning of the Court of Appeals that Article 37 establishes a reasonable qualification for notaries public, because they are required to administer oaths, is fallacious. The administration of an oath is a ministerial function. It serves as a certification by a person registered by the state that the affiant has either sworn to or affirmed the notarized statement and hence is subject to the penalty for false swearing if the statement is false and material. Maryland law does not require a notary public to explain the nature of the oath to the affiant. Anno. Code Md. (1957), Art. 68, Sec. 3. Even were there such a requirement, it would not disqualify a person who does not believe in God from making such explanation.[9]

Article 37 of the Declaration of Rights of the Maryland Constitution, by disqualifying from public office those persons who, for one reason or another, cannot conscientiously declare their belief in the existence of God, discriminates against such persons on the basis of their religious beliefs or disbeliefs. Such discrimination by a state is prohibited by the equal protection clause of the Fourteenth Amendment. *Niemotko* v. *Maryland*, 340 U. S. 268, 272-3 (1951); *Fowler* v. *Rhode Island*, 345 U. S. 67 (1953), especially Mr. Justice Frankfurter's concurring opinion.

The protection of the Fourteenth Amendment against discrimination, including discrimination on the basis of religion, invalidates state laws and practices which autho-

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9. The Maryland Court of Appeals' rationalization, that Article 37 is justified because notaries public are required to administer oaths, is clearly an *ad hoc* argument. How does this justification explain the applicability of the requirements of Article 37 to all those public officers who are not called upon to administer oaths?

rize the exclusion of persons from public employment on any discriminatory basis.

> • • • constitutional protection does extend to the public servant whose exclusion pursuant to a statute is patently arbitrary or discriminatory. *Wieman* v. *Updegraff*, 344 U. S. 183, 192 (1952). See, also *Slochower* v. *Board of Higher Education of the City of New York*, 350 U. S. 551, 556 (1955).

While *Wieman* and *Slochower* dealt with dismissal from public employment on arbitrary and discriminatory grounds, the case at bar involves disqualification from appointment to public office on such grounds. The constitutional safeguards of due process and equal protection apply to both situations. A ground on which a state may not predicate dismissal of one of its employees, likewise may not serve as a basis for refusal to appoint a person to an office of public trust or profit. It is the opportunity to hold public office—including the right to be appointed and the right to continue in office—which may not be abridged by the use of standards that run afoul of the due process or equal protection clauses.[10] The language used by this Court in *Wieman* and *Slochower* surely is broad enough to encompass both concepts.

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10. State statutes forbidding discrimination in employment invariably protect both the opportunity to secure employment and the right not to be discharged because of race, color or religion. For the citation of these state statutes, see Greenberg, *Race Relations and American Law*, pp. 384-5. See also Executive Order No. 10557, prohibiting discrimination in hiring or discharging employees in connection with the performance of work under government contracts. 19 F. R. 5655, Sept. 8, 1954.

Conclusion

The provision of Article 37 of the Declaration of Rights of the Constitution of Maryland, requiring a declaration of belief in the existence of God as a qualification for any office of profit or trust in the State, violates the Federal Constitution.

Respectfully submitted,

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January 20, 1961

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 373

ROY R. TORCASO,

Appellant,

v.

CLAYTON K. WATKINS,
CLERK OF THE CIRCUIT COURT FOR MONTGOMERY COUNTY, MARYLAND,

Appellee.

ON APPEAL FROM THE COURT OF APPEALS OF MARYLAND

BRIEF OF APPELLEE

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 373

ROY R. TORCASO,

Appellant.

v.

CLAYTON K. WATKINS,
CLERK OF THE CIRCUIT COURT FOR MONTGOMERY COUNTY, MARYLAND,

Appellee.

ON APPEAL FROM THE COURT OF APPEALS OF MARYLAND

BRIEF OF APPELLEE

OPINIONS BELOW

The opinions delivered in the courts below are as follows:

1. The Circuit Court for Montgomery County, Maryland, sustained a demurrer to a petition for writ of mandamus filed by the Appellant and held that the provision of Article 37 of the Declaration of Rights of the Maryland Constitution was a qualifying condition for citizens who desired to be public officers of this State, and that said Article does not violate the provisions of the First or

Fourteenth Amendments to the Constitution of the United States. This opinion is not officially reported, but appears in the Record (R. 7-10).

2. The Court of Appeals of Maryland affirmed the judgment of the Circuit Court for Montgomery County, holding that the provisions of Article 37 of the Declaration of Rights of the Constitution of Maryland do not violate the provisions of the First and Fourteenth Amendments to the Constitution of the United States. This opinion is officially reported at 223 Md. 49 and 162 A. 2d 438, and also appears in the Record (R. 12-19).

JURISDICTION

The jurisdiction of this Court is governed by 28 U.S.C., Section 1257(2). Probable jurisdiction was noted by this Court on November 7, 1960, 364 U.S. 877.

CONSTITUTIONAL PROVISIONS INVOLVED

The constitutional provisions involved in this appeal are Article 37 of the Declaration of Rights of the Maryland Constitution and the First and Fourteenth Amendments to the Constitution of the United States, all of which are set forth verbatim on page 2 of the Appellant's brief.

QUESTIONS PRESENTED

1. Does Article 37 of the Declaration of Rights of the Maryland Constitution, which requires "a declaration of belief in the existence of God" as a qualification for "any office of profit or trust in this State", violate the ban contained in the First Amendment to the Constitution of the United States respecting the establishment of religion or prohibiting the free exercise thereof?

2. Has the Appellant been denied due process of law or equal protection of the law as guaranteed by the Fourteenth Amendment to the United States Constitution?

3. Does Article 37 of the Declaration of Rights of the Maryland Constitution violate the provisions of Article 6 of the Constitution of the United States?

STATEMENT OF THE CASE

The Appellant filed a petition for a writ of mandamus against the Clerk of the Circuit Court for Montgomery County praying that the Clerk be commanded to render the oath or affirmation set forth in Article I, Section 6, of the Constitution of the State of Maryland, and that the Clerk further be commanded to issue unto the petitioner a commission as a Notary Public in and for Montgomery County, Maryland. A demurrer was filed on behalf of the Clerk to said petition. The petition alleged that the Appellant, a citizen of the United States and a resident of Montgomery County for more than the two years previous, had been duly appointed by the Governor as a Notary Public in and for that County, but when the Appellant went to the Clerk's office to obtain his commission and qualify for the office, the Clerk requested him to take and subscribe to a certain oath and declaration. The Appellant refused to do so, and thereupon the Clerk refused to deliver the commission to the Appellant. The oath and declaration are fully set forth in the Record (R. 3). In his petition for a writ of mandamus, the Appellant stated "* * * that he would not declare that he believed in the existence of God. * * *" (R. 3), and because of this the Clerk refused to issue a commission. The petition does not set forth any facts showing that the Appellant refused to make such a declaration because of any religious scruples and, in fact, sets forth no reason

other than his belief that said requirement is unconstitutional. Since there was no trial on the merits, the Appellant's religious affiliation, or lack of it, was never developed and, therefore, does not appear in the Record.

SUMMARY OF ARGUMENT

I. The Maryland constitutional provision requiring as a qualification for public office a belief in the existence of God does not violate the provisions of the First Amendment to the Constitution of the United States, either in itself, or as embodied in the Fourteenth Amendment, since it does not relate to the establishment of religion or prohibit the free exercise thereof, but rather recognizes and reaffirms the organic utterances of the people that this is a religious nation.

Said oath does not prefer one religion over another or aid all regligions, but merely establishes a reasonable qualification for the holding of public office in the State of Maryland, which has been recognized by this Court as being competently within the judgment of the states in establishing the conditions and qualifications for holding state office.

II. It has long been recognized that the holding of State office is a privilege of State citizenship and the denial by State action of the privilege to be a candidate for State office is not a denial of due process of law or equal protection of the laws as guaranteed by the Fourteenth Amendment to the Constitution of the United States.

III. The constitutional provision contained in Article 6 of the Constitution of the United States expressly was never intended to apply to State officers, and further, this question was not specifically passed upon by the Court of Appeals of Maryland and was not mentioned in Appel-

lant's brief in said Court. The Court of Appeals found that the Appellant did not press its contention that the provisions of Article 6 of the Constitution of the United States is applicable to the states (R. 17). Having abandoned this argument below, it is improper for this Court to rule on this issue. See *Nelson v. County of Los Angeles*, 362 U.S. 1; *Adler v. Board of Education*, 342 U.S. 485.

ARGUMENT

I.

Article 37 of the Declaration of Rights of the Maryland Constitution, which requires "A Declaration of Belief in the Existence of God" as a qualification for "Any Office of Profit or Trust in this State", Does Not Violate the Ban contained in the First Amendment to the Constitution of the United States respecting the Establishment of Religion or Prohibiting the Free Exercise Thereof.

From the beginning of the history of our nation, there has been a realization and recognition in all branches of our Government of the existence of a Supreme Being in the conduct of our affairs. This was clearly recognized in the Declaration of Independence, where it was stated as follows:

> "We hold these truths to be self-evident, that all men are created equal, that they are *endowed by their Creator* with certain unalienable rights, that among these are life, liberty and the pursuit of happiness. * * *
>
> "We, therefore, the representatives of the United States of American, in General Congress assembled, *appealing to the Supreme Judge* of the world for the rectitude of our intentions, do, in the name and by authority of the good people of these Colonies, solemnly publish and declare * * *; and

"For the support of this declaration, with a firm reliance on the *protection of Divine Providence*, we mutually pledge to each other our lives, our fortunes and our sacred honor." (Emphasis supplied.)

This realization and recognition of the existence of a Supreme Being continues today, and particularly when relating to public officers and the conduct of their official affairs. The constitutions of at least seven states, in addition to Maryland expressly require a belief in the existence of a Supreme Being as a qualification for public office.[1] Further, several states by constitution or statute prescribe mandatory oaths of office ending in the words "So

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[1] *Arkansas* — Art. 19, Sec. 1.
"No person who denies the being of a God shall hold any office in the civil department of this State, nor be competent to testify as a witness in any court."

Mississippi — Art. 14, Sec. 265.
"No person who denies the existence of a Supreme Being shall hold any office in this State."

North Carolina — Art. VI, Sec. 8.
"The following classes of persons shall be disqualified for office: First, all persons who shall deny the being of Almighty God, * * *".

Pennsylvania — Art. 1, Sec. 4.
"No person who acknowledges the being of a God, and a future state of rewards and punishments shall, on account of his religious sentiments, be disqualified to hold any office or place of trust or profit under this Commonwealth."

South Carolina — Art. 17, Sec. 4.
"No person who denies the existence of a Supreme Being shall hold any office under this Constitution."

Tennessee — Art. 9, Sec. 2.
"No person who denies the being of God, or a future state of rewards and punishments, shall hold any office in the civil department of this State."

Texas — Art. 1, Sec. 4.
"No religious test shall ever be required as a qualification to any office, or public trust, in this State; nor shall any one be excluded from holding office on account of his religious sentiments, provided he acknowledged the existence of a Supreme Being."

help me God".[2] Title 5, U.S.C.A., Section 16, prescribes the oath to be taken by any person, elected or appointed, to any office of honor or profit in the civil, military or naval service, except the President of the United States, and concludes with the supplication, "So help me God".[3] Likewise, Federal judges, including the members of this Honorable Court, qualify by being sworn into office with a mandatory oath that concludes "So help me God".[4]

In our executive branch of Government, the new Chief Executive implored the people of the United States to rely

[2] For example, Article 16, Alabama Constitution
Article 38-31 Arizona Revised Statutes
Title 98-1-1 Colorado Statutes
Title 1, Sec. 25, Connecticut Statutes
Article 16, Sec. 2, Florida Constitution
Article 71-103, Georgia Statutes
Article 19, Sec. 1, Louisiana Constitution
Article 9, Sec. 1, Maine Constitution
Article 15, Sec. 2, Nevada Constitution
Sec. 211, North Dakota Const.
Sec. 34, Virginia Const.

[3] See also 39 U.S.C.A. 3103, setting forth the oath of the Postmaster General and all employees of the Postal Service, which also ends with the words "So help me God". This statute was repealed and re-enacted with slight amendment by Public Law 86-682, approved September 2, 1960.

[4] Title 28, U.S.C., Sec. 453, reads as follows:
"Oaths of justices and judges.
Each justice or judge of the United States shall take the following oath or affirmation before performing the duties of his office: 'I, , do solemnly swear (or affirm) that I will administer justice without respect to persons, and do equal right to the poor and to the rich, and that I will faithfully and impartially discharge and perform all the duties incumbent upon me as according to the best of my ability and understanding, agreeably to the Constitution and laws of the United States. So help me God'." June 25, 1948, c. 646, 62 Stat. 907.

upon the will of the Almighty God.[5] In addition, Congress, the legislative branch of our national Government, daily invokes divine blessings and guidance for their proceedings (See dissenting opinion of Mr. Justice Reed in *McCollum v. Board of Education*, 333 U.S. 203). Similarly, Congress has prescribed a Pledge of Allegiance to the Flag of the United States, exclaiming that this is "One Nation Under God" (36 U.S.C.A., 172); our coins, by legislative enactment, declare "In God We Trust" (31 U.S.C.A. 324); also, the second stanza of our National Anthem reverently proclaims "And this be our Motto, 'In God is our Trust' ".

QUERY: Are not the oaths required by the constitutions and statutes of the various states, as well as the United States, an expression of the people of a moral accountability by all public officials who enter into the public service of their state or of their country? The question therefore arises whether a belief in moral accountability for conduct is inconsistent with religious liberty in this nation.

The provisions of Article 37 of the Declaration of Rights of the Maryland Constitution were expressly reviewed by this Court in an unanimous opinion written by Mr. Justice Brewer in *Church of the Holy Trinity v. United States*, 143 U.S. 457. In that case the Court was called upon to de-

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[5] Inaugural Address of President Kennedy, January 20, 1961.

"We observe today not a victory of party but a celebration of freedom — symbolizing an end as well as a beginning — signifying renewal as well as change. For I have sworn before you and Almighty God the same solemn oath our forebears prescribed nearly a century and three quarters ago.

"The world is very different now. For man holds in his mortal hands the power to abolish all form of human poverty and all form of human life. *And yet the same revolutionary beliefs for which our forebears fought are still at issue around the globe — the belief that the rights of man come not from the generosity of the state but from the hand of God.*" (Emphasis supplied.)

termine whether an Act of Congress prohibiting the importation of aliens under contract included a contract for the immigration of members of the clergy. The Court, in finding that Congress never intended to include members of religious societies who migrated to the United States, reviewed *the historical religious background of* this nation and said:

> "* * * But beyond all these matters, no purpose of action against religion can be imputed to any legislation, state or nation, because this is a religious people. This is historically true. From the discovery of this continent to the present hour there is a single voice making this affirmation."

In reviewing the historical support for this assertion, Mr. Justice Brewer in the opinion expressly cited and quoted the provisions found in Articles 36 and 37 of the Declaration of Rights of the Constitution of Maryland, being the very same provisions now under attack. The Court concluded:

> "There is no dissonance in these declarations. There is a universal language pervading them all, having one meaning; they affirm and reaffirm that this is a religious nation. These are not individual sayings, declarations of private persons; they are organic utterances; they speak the voice of the entire people. * * *".

More recently, in *United States v. Macintosh*, 283 U.S. 605, this Court denied an application for naturalization of a person who refused to make a declaration that he was willing to support the Constitution, even to the extent of bearing arms in any war unless he regarded it as morally justified. Mr. Justice Sutherland, speaking for a majority of the Court, stated:

> "* * * We are a Christian people * * *, according to one another the equal right of religious freedom

and acknowledging with reverence the duty of obedience to the will of God. * * *".

Mr. Chief Justice Hughes, (Justices Holmes, Brandeis and Stone, concurring) in dissenting stated:

> *"One cannot speak of religious liberty with proper appreciation of its essential and historic significance without assuming the existence of a belief in supreme allegiance to the will of God.* * *". (Emphasis supplied.)

Cf. *Girouard v. U. S.*, 328 U.S. 61.

In *Zorach v. Clauson*, 343 U.S. 306, Mr. Justice Douglas, speaking for a majority of the Court, exclaimed:

> *"We are a religious people whose institutions presuppose a Supreme Being.* We guarantee the freedom to worship as one chooses. We make room for as wide a variety of beliefs and creeds as the spiritual needs of man deem necessary. We sponsor an attitude on the part of government that shows no partiality to any one group and that lets each flourish according to the zeal of its adherents and the appeal of its dogma. When the State encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our tradition. For it then respects the religious nature of our people and accommodates the public service to their spiritual needs. To hold that it may not would be to find in the Constitution a requirement that the government show a callous indifference to religious groups. That would be preferring those who believe in no religion over those who do believe. * * *". (Emphasis supplied.)

The Appellant, in his brief, argues that the First Amendment to the Constitution of the United States equally permits freedom for those who entertain non-theistic beliefs as well as for those who entertain theistic beliefs. Ap-

pellee respectfully submits that the Constitution of Maryland, Article 36 of the Declaration of Rights, fully guarantees the right of an individual to worship in such manner as is most acceptable to him. The State of Maryland, by requiring as a qualification of office a belief in the existence of God, is in no way infringing upon the freedom of the Appellant or anyone else to hold any belief whatsoever The State of Maryland does not endeavor to force or influence the Appellant to attend or remain away from any church, or to force him to profess or express belief in any religion. The Appellant does not allege, nor is it a fact, that he will be punished or otherwise injured by his refusal to express a belief in the existence of God. There is no allegation that his religious practices, or the lack of them, have interfered with any of his rights of citizenship, or that he has been required to worship other than in accordance with the dictates of his own conscience.

The position of Notary Public which the Appellant seeks is a public office in the State of Maryland and there is no constitutional or inherent right to hold public office, but that is a political privilege. *Taylor v. Beckham*, 178 U.S. 548; *Bailey v. Richardson*, 182 F. 2d 46, 59, aff'd. per curiam by an equally divided court, 341 U.S. 918.

The unwillingness of the Appellant to declare his belief in the existence of God clearly makes him not qualified to hold public office in Maryland. This Court has on several occasions recognized that the holding of State office or employment is a privilege, the qualifications for which may be established by State constitutional laws, as long as they are not unreasonable and discriminatory. In *Garner v. Board of Public Works*, 341 U.S. 716, Mr. Justice Clark, speaking for a majority of the Court, stated as follows:

> "We think that a municipal employer is not disabled because it is an agency of the State from inquiring of its employees as to matters that may prove relevant to their fitness and suitability for the public service. Past conduct may well relate to present fitness; past loyalty may have a reasonable relationship to present and future trust. Both are commonly inquired into determining fitness for both high and low positions in private industry and are not less relevant in public employment. * * *".

To the same effect, see *Gerende v. Board of Supervisors of Elections*, 341 U.S. 56; *Adler v. Board of Education*, 342 U.S. 485; and *Slochower v. Board of Education*, 350 U.S. 551.

The responsibility for establishing requirements as to the qualifications of its public officers rests with the people of Maryland. *In re Summers*, 325 U.S. 561; *Nelson v. County of Los Angeles*, *supra*.

The Appellant further contends that his inability to qualify for public office constitutes an impairment of religious liberty and is an interference of the free exercise of religion. The Appellee believes that this assertion is neither supported in fact nor in law. There is no contention in the petition for writ of mandamus that the Appellant has in any way been denied any religious liberty, nor that he has been in any way restrained from the manner in which he can exercise his beliefs. This Court on many occasions has reviewed state statutes which allegedly interfere with religious liberty, but the court has never found such State action improper. In *Davis v. Beason*, 133 U.S. 333, this Court considered an Act of Congress which outlawed bigamy and polygamy in the territory of Idaho. The law provided that anyone who failed to take an oath which, in essence, stated that he did not belong to any order, organization or association which *believed* in the

practice of such act or which practiced polygamy or bigamy, did not qualify to hold public office. This Court held that the law did not violate the First Amendment to the United States Constitution and stated:

> *"The term 'religion' has reference to one's views of his relation to his Creator, and to the obligations they impose of reverence for his being and character, and of obedience to His will. It is often confounded with the Cultus or form of worship of a particular sect, but is distinguishable from the latter.* The First Amendment to the Constitution, in declaring that Congress shall make no law respecting the establishment of religion, or forbidding the free exercise thereof, was intended to allow everyone under the jurisdiction of the United States to entertain such notions respecting his relations to his Maker and the duties they impose as may be approved by his judgment and conscience, and to exhibit his sentiments in such form of worship as he may think proper, not injurious to the equal rights of others, and to prohibit legislation for the support of any religious tenets, or the modes of worship of any sect. * * *".
>
> "It is assumed by counsel of the petitioner that, because no mode of worship can be established or religious tenets enforced in this country, therefore any form of worship may be followed and any tenets, however destructive of society, may be held and advocated, if asserted to be a part of the religious doctrines of those advocating and practicing them. But nothing is further from the truth. * * *". (Emphasis supplied.)

See also *Reynolds v. United States*, 98 U.S. 145; and *Murphy v. Ramsey*, 114 U.S. 15. Again this Court in the case of *Hamilton v. University of California*, 293 U.S. 245, held that the refusal, on religious grounds, to participate in compulsory military instruction in state-operated land grant colleges was ground for dismissal and that the liberty of the students who so refused had not been infringed

upon. Mr. Justice Cardozo, in his concurring opinion, commented as follows:

> "Manifestly a different doctrine would carry us to lengths that have never yet been dreamed of. The conscientious objector, if his liberties were to be thus extended, might refuse to contribute taxes in furtherance of a war, whether for attack or for defense, or in furtherance of any other end condemned by his conscience as irreligious or immoral. * * *".

See also *Hanauer v. Elkins*, 217 Md. 213, __ A. 2d __; *North v. University of Illinois*, 27 N.E. 54. Congress, in the Universal Military Training and Service Act of 1948 (50 U.S.C., App. Sec. 456(j)), stipulated that to be exempt from military service on the grounds of "religious training and belief", such belief must relate to a "Supreme Being" and cannot be "a merely personal moral code". See *George v. United States*, 196 F. 2d 445, 450; cert. den. 344 U.S. 843.

The Appellant, in his brief, relies heavily upon dictum of this Court in the cases where the questions of religion and public education have come into conflict. It is interesting to note that in all except one (*McCollum v. Board of Education*, 333 U.S. 203), the Court has declined to find an unconstitutional establishment of or aid to religion. In *Quick Bear v. Leupp*, 210 U.S. 50, it was held that payments to Indians for religious education of Indian children was not unconstitutional. Subsequently, in *Cochran v. Louisiana*, 281 U.S. 370, the Court upheld the expenditure of public funds raised by taxation for the supplying of free school books to children attending school, whether public or private, sectarian or non-sectarian. In *Everson v. Board of Education*, 330 U.S. 1, this Court was requested to declare unconstitutional an act of the New Jersey Legislature which authorized reimbursement to parents of transportation fees paid for transporting their children to private schools, including sectarian schools.

The Court held that the First Amendment to the United States Constitution did not prohibit New Jersey from spending tax-raised funds to pay bus fares for parochial school pupils as a part of the general program under which it pays the fees of pupils attending public and other schools. The majority of the court, in the opinion written by Mr. Justice Black, stated the protection of the First Amendment as follows:

> "The 'establishment of religion' clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa. In the words of Jefferson, the clause against establishment of religion by law was intended to erect 'a wall of separation between Church and State.'"

It is important to note that the activity of the State of Maryland and its sister states in requiring its public officers to express a belief in the existence of God or moral accountability to God do not in any way contravene any of the propositions above set forth.

Thereafter, in *McCollum v. Board of Education*, 333 U.S. 203, it was held that religious instruction during "released time" in property owned by the Board of Education was allowing public school buildings to be used for religious